Supreme Court, U.S.
06-1702 JUN 21 2007
OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

RELIABLE CONSULTANTS, INC.,
d/b/a DREAMERS,
Petitioner,

v.

CITY OF KENNEDALE, TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 21, 2007

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QUESTIONS PRESENTED

1. Whether a court of appeals assessing the constitutionality of an adult business ordinance under *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), is required to give deference to the district court's factual findings underlying the conclusion that a municipality's evidence does not reasonably support its rationale.

2. Whether a court of appeals reviewing the constitutionality of an adult business ordinance under *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), must conduct a *de novo* burden-shifting analysis.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Reliable Consultants, Inc. d/b/a Dreamers. Respondent is the City of Kennedale, Texas. Pursuant to Supreme Court Rule 29.6, Reliable Consultants, Inc. makes the following disclosure:

Reliable Consultants, Inc. has no parent corporations and no public company owns more than ten percent of Reliable Consultants, Inc.'s stock.

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Petitioner Reliable Consultants, Inc. petitions this Court to review the Fifth Circuit's decision finding the City of Kennedale, Texas' adult business ordinance to be narrowly tailored. The court of appeals' decision misapplied this Court's ruling in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), by fashioning a more stringent standard of review for district court factual findings than is required by Civil Rule 52(a) and by failing to conduct a full burden-shifting analysis of the secondary effects issue. This Court should accept review of this case to correct the dangerous precedent established by the Fifth Circuit below.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit reversing the district court and finding the City of Kennedale's sexually oriented business ordinance to be narrowly tailored is reported at 480 F.3d 336. App. 3a. The Fifth Circuit's order denying *en banc* review is unreported. App. 1a. The district court's ruling invalidating Kennedale's ordinance is also unreported. App. 43a.

JURISDICTION

The decision of the court of appeals was issued on February 23, 2007. On March 23, 2007, the Fifth Circuit declined *en banc* review. The Court has jurisdiction under 28 U.S.C. § 1254(1) to review this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case implicates the Free Expression Clause of the First Amendment, which provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

STATEMENT OF THE CASE

Petitioner Reliable Consultants, Inc. does business within the City of Kennedale, Texas as Dreamers. App. 4a. Dreamers is a bookstore which sells video tapes, DVD's, magazines, and other print material of non-obscene, sexually explicit nature, as well as novelties, clothing, and other general merchandise. App. 4-5a. None of the materials sold at Dreamers can be viewed or consumed on premises and the store offers no live entertainment, viewing booths, or theaters at its Kennedale location. *Id.*

On May 27, 1999, the City of Kennedale annexed property from Tarrant County, Texas that included the location upon which Reliable is located. App. 4a. Within the annexed property, the City created an overlay district and passed specific regulations regarding the types of businesses that may lawfully operate there. At the time Reliable's property was annexed, the City's zoning code prohibited the location of a sexually oriented business within 800 feet of another sexually oriented business. App. 4a. The zoning code also limited operation of adult businesses to specific zoning districts and restricted the location of an adult business within 800 feet of certain protected uses, including residences. App. 4a.

Shortly after annexing Reliable's Kennedale location, the City enacted regulations which prohibited sexually oriented businesses from operating in the overlay zone. Those regulations set forth a three year amortization period within which all existing adult businesses, including Reliable, were required to relocate. App. 4a. Concerned that the additional zoning provisions, including the overlay district ban and the 800 foot distance requirement, left no available sites within the City upon which to relocate, Reliable filed its complaint

challenging the constitutionality the City's adult business zoning scheme. Among the concerns raised by Reliable was the fact that an insufficient number of alternative locations were available to accommodate the five adult establishments existing at the time in Kennedale, as well as the fact that the City had failed to sufficiently document its belief that such businesses cause negative secondary effects to the neighboring community. App. 4a.

In an attempt to rebut these claims, the City presented three categories of evidence to the district court: 1) outdated studies from other cities that address "adult bookstores" without defining that term;[1] 2) an opinion survey of land use appraisers conducted by the City's own attorney; and 3) citizen commentary at public meetings that failed to distinguish between Kennedale's on-premises and off-site adult businesses. App. 4a.[2] Based upon this evidence, the City argued that it met its burden of demonstrating that adult businesses in general, and bookstores with no on-site entertainment in particular,[3] generate unwanted secondary

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[1] The studies relied upon by the City are reprinted at App. 92a and 108a. While the text of the studies is complete, multiple tables and charts that are immaterial to the resolution of the issues in this petition were omitted due to printing constraints.

[2] The City also attempted to supplement its case with additional evidence of litter, traffic, and noise, but the district court rejected that attempt and refused to consider the new information. App. 28a, 37a. As such, the district court's assessment of the City's interests was limited to its initial evidence.

[3] The Fifth Circuit has adopted a more stringent narrow tailoring requirement where the businesses targeted by an adult entertainment ordinance offer no on-site entertainment. *See Encore*

effects. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986).

In reviewing the evidence initially submitted by the City, the district court conducted burden-shifting analysis under *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), to determine whether the City's evidence was "shoddy" or whether instead it fairly supported the City's rationale. App. 62-67a. At step one, the court excluded the city attorney's study on the grounds that it was so methodologically flawed as to be unreliable. App. 65-67a. Problematic in the court's view was the fact that the survey did not sufficiently limit its questions to take-home-only businesses, did not adhere to well-accepted standards of scientific rigor, and contained mixed results. Based on these deficiencies, the court labeled the city attorney study "shoddy" and excluded it from the narrow tailoring analysis. *Id.* The court also concluded that, because the citizen commentary did not identify take-home-only businesses as the source of the complaints, it too could not form a reasonable basis for regulating off-premises establishments like Reliable. App. 62-64a. With respect to the outdated, outside studies, the court further determined that the studies were too attenuated to the City's problems to be relevant. App. 64a. As the district court noted, the predicate studies from other jurisdictions entirely failed to distinguish between adult businesses with on-site entertainment and the more innocuous retail outlets without on-premises services. *Id.* Moreover, as the district court noted, the term "adult bookstore" is a term of art that has historically referred to establishments which

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Videos, Inc. v. City of San Antonio, 330 F.2d 288 (5th Cir. 2003). The validity and application of that standard is not at issue in this petition.

offer both on- and off-premises entertainment. *Id.* Not surprisingly, given the dearth of evidence supporting the City's secondary effects rationale, the district court invalidated Kennedale's adult business ordinance on the grounds that it was not narrowly tailored to the City's interests. App. 66-67a. The district court then awarded Reliable attorney fees under 42 U.S.C. § 1988 based on its status as the prevailing party. App. 12a.

The City appealed to the Fifth Circuit, arguing that the district court improperly categorized the city attorney survey as "shoddy" data under *Alameda Books*. The court of appeals, however, did not reach this issue, because it determined that the City's use of outside studies to document the secondary effects of off-premises businesses was reasonable. App. 10-11a. In this vein, the court concluded that the use of the term "bookstore" in the Indianapolis and Oklahoma City studies indicates that they were focused upon, and determined that secondary effects are caused by, take-home-only retail establishments. App. 9-10a. In reaching this conclusion, the Fifth Circuit failed to employ the burden-shifting analysis required by this Court's decision in *Alameda Books*, instead analyzing only the City's evidence without affording Reliable the opportunity to cast doubt on the City's rationale. Even more troubling is the fact that the court of appeals applied a *de novo* standard to the district court's finding as to the meaning of the term "bookstore," rather than the deference normally given to lower courts' factual determinations. App. 5a.

These missteps in the Fifth Circuit's analytic framework resulted in the court reaching the improper, and unjustified, conclusion that Kennedale's ordinance is narrowly tailored. Two key pieces of evidence available to the Fifth Circuit highlight the flaws in its overly narrow definition of the term

"adult bookstore." First, contrary to the court's ruling, neither the Indianapolis nor Oklahoma City study contain a definition of the term "bookstore," but elsewhere imply that the range of businesses addressed by the survey included those with on-site arcades. App. 103a (noting that a business named "Adult Arcade," whose title suggests that adult videos could be viewed on-premises, was included in the Indianapolis study group). Second, and more importantly, the City itself recognized that the Indianapolis and Oklahoma City studies did not distinguish between take-home-only and on-site establishments. In fact, the City commissioned a separate study to address take-home-only businesses specifically because it believed the Indianapolis and Oklahoma City surveys were deficient in that area. App. 74a. Thus, the Fifth Circuit not only applied an inappropriate standard of review to the district court's treatment of the bookstore studies, but also reached its own unsupported, and unsupportable, factual findings regarding the scope and meaning of the City's predicate studies.

Reliable promptly filed a motion for panel rehearing emphasizing these factual problems with the Fifth Circuit's opinion. Despite the numerous deficiencies in the court of appeals' reasoning, the panel refused the request. App. 2a. Reliable now seeks this Court's intervention to determine the proper standard of review, and in particular whether a district court's findings under *Alameda Books* are entitled to deference and are to be reviewed only for clear error, when an adult business challenges the secondary effects rationale underlying a municipal ordinance.

REASONS FOR GRANTING THE WRIT

I. Lower Courts are in Need of Guidance as to the Appropriate Standard of Review for District Court Factual Findings Under *City of Los Angeles v. Alameda Books, Inc.*

Pursuant to Civil Rule 52(a), a district court's factual findings may not be disturbed on appeal unless clearly erroneous. A finding resolves a question of fact when it constitutes a "conclusion by way of reasonable inference from the evidence." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163-64 (1988) (citing Black's Law Dictionary 569 (5th ed. 1979)). A finding is clearly erroneous under this standard only when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *See Anderson v. City of Bessamer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 392 (1948)). Under this rule, an appellate court may not reverse a factual finding merely because it would have ruled differently at trial. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Moreover, where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous within the meaning of Civil Rule 52(a). *See United States v. Yellow Cab Co.*, 338 U.S. 338, 324 (1949).

To meet its burden of demonstrating that its sexually oriented business zoning ordinances were narrowly tailored as applied to Reliable, the City proffered two outside studies: one from Indianapolis and one from Oklahoma City. The City argued that because these studies contained the generic term "adult bookstore," they inherently must have referred to those stores that do not offer on-site entertainment. App. 8-

9a. As such, the City reasoned that the negative secondary effects documented in each of the studies must have been caused by take-home-only bookstores because those were the only businesses included in the surveys. *Id.*

The district court analyzed the City's assertions under this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and determined that the outside studies did not fairly support the City's rationale. App. 66a n.11. More specifically, the court held that, because the studies did not on their face exclusively address stores with no on-site arcades or theaters, the City acted unreasonably in interpreting them as evidence that take-home-only businesses cause secondary effects. App. 64-65a. Buttressing the court's determination were cases from a host of other jurisdictions that used the term "bookstore" in a broad sense to encompass not only those businesses that offer products for in-home consumption but also those that present on-premises entertainment. App. 64a (citing *United States v. Jenkins*, 46 F.3d 447, 449 (5th Cir. 1995); *Alameda Books*, 535 U.S. at 432). Relying both upon these cases and the definitional gaps in the studies themselves, the district court found that the City's reliance upon the Indianapolis and Oklahoma City studies for the proposition that take-home-only retail stores cause negative secondary effects was unreasonable. App. 65a. In so doing, the district court did not characterize the studies themselves as "shoddy" but rather ruled that the City's conclusions derived from the studies were unjustified, an important distinction in applying this Court's *Alameda Books* framework.

Under Rule 52(a) and this Court's decisions expounding upon the clearly erroneous standard, the district court's determination that the term "bookstore" contained in the outside studies did not refer to exclusively take-home-only

businesses was entirely factual. Nevertheless, the Fifth Circuit reviewed the district court's findings *de novo* rather than under the deferential standard required by Civil Rule 52(a). App. 5a. To reach this conclusion, the Fifth Circuit made two key errors. First, the court mischaracterized the district court's holding regarding the outside predicate studies as a determination that the studies were "shoddy," when the district court had merely ruled that the studies did not apply to take-home-only businesses. App. 10a. In this regard, the Fifth Circuit erroneously transformed what should have been a question of fact into a mixed question of law and fact. Then, based upon this mischaracterization of the district court's opinion, the circuit court applied a novel standard of review to the district court's *Alameda Books* findings: only the district court's findings as to the existence of a city's motives were reviewed under the clear error standard, while any determinations as to how those motives fit into the *Alameda Books* framework were reviewed *de novo*. App. 5a.

While at first blush this standard may not appear to be a departure from the clearly accepted standard of review, the Fifth Circuit's application of its newly crafted standard to Reliable is indicative of the fundamental problem with the test. The district court's ruling below contained both factual and legal components. First, the district court determined that the Indianapolis and Oklahoma City studies did not focus on only take-home-only businesses, but instead included within the category of adult bookstores those establishments that had on-site arcades and theaters. App. 64a. Then, based upon that finding, the lower court concluded that the City acted unreasonably in relying upon the outside studies in regulating take-home-only businesses given that they did not address that type of store exclusively. App. 64-65a. Pursuant to Rule 52(a), the former determination was purely factual and therefore entitled to deference. The latter decision, however,

which required application of the court's prior factual determination to the standards announced by this Court in *Alameda Books*, was a legal conclusion subject to *de novo* review. The Fifth Circuit confused the two standards and in essence reviewed the district court's findings as to the meaning of the term "bookstore" *de novo*. App. 10a.

The ruling below bastardizes the Rule 52(a) standard as applied to lower courts' *Alameda Books* determinations. Applying the Fifth Circuit's reasoning, only a district court's identification of the governmental interests at work in an adult business ordinance is reviewed for clear error, while factual determinations tantamount to those interests, such as the magnitude of the problem or the credibility of the witnesses, are subject to the court of appeals' own view of the facts. This turns both Rule 52(a) and this Court's decision in *Alameda Books* on their respective heads. It is clear from the *Alameda Books* opinion that this Court intended the district courts to play a pivotal role in determining the factual underpinnings of any adult business regulatory scheme. *See Alameda Books*, 535 U.S. at 435-37. It is equally clear from the text of Rule 52(a) that the district court is to serve as the arbitrator of facts in the federal court system. *See also* FED. R. CIV. P. 52(a), cmt. (1985) ("To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority."). Yet the Fifth Circuit's decision here, if allowed to stand, will remove the key fact-finding role from the district court and place it in the hands of the appellate courts, which have no contact with witnesses or evidence other than through the lens of a district court.

Absent intervention from this Court, the Fifth Circuit's ruling threatens to undermine Rule 52(a) and the deference entitled to district court fact-finding on the mistaken assumption that this Court's *Alameda Books* decision alters the analysis. It is therefore imperative that this Court intervene to further elaborate and define the standard of review applicable to a district court's *Alameda Books* factual findings.

II. This Court's Opinion in *City of Los Angeles v. Alameda Books, Inc.* is Silent as to Whether the Circuit Courts Must Conduct Burden-Shifting Analysis in Reviewing the Constitutionality of an Adult Business Ordinance *De Novo*, Conflicting with the Tenth Circuit's Decision in *Heideman v. South Salt Lake City*.

In *Alameda Books*, 535 U.S. 425, a plurality of this Court explained the evidentiary requirements for municipalities that have enacted speech-restraining regulations to prevent secondary effects. As the Court's ruling notes, first "the city certainly bears the burden of providing evidence that supports a link between" the regulation and the "asserted secondary effects." *Id.* at 437. At that stage of the challenge, the municipality "does not bear the burden of providing evidence that rules out every theory" opposing its theory or of providing evidence that is capable of supporting only that one theory. *Id.* at 437-38. Rather, the evidence must at a minimum be "reasonably believed to be relevant" in showing a connection between speech and effect. *Id.* at 438 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)). However, as this Court admonished, that the government bears a less stringent burden at the initial stage of the burden-shifting framework is "not to say that a municipality can get away with shoddy data or reasoning." *Id.*

At the second step, a majority of this Court agreed that once the municipality's initial burden is met, the parties challenging the restraint have the burden of offering "a competing theory" or some "reason to question the city's theory." *Id.* at 437. They must "succeed in casting doubt on" the municipality's rationale either "by demonstrating that the . . . evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings." *Id.* at 438-39. If the parties challenging a regulation are able to call into question the municipality's reasoning, "the burden shifts back to the municipality to supplement the record with evidence renewing support" for the justification of the regulation. *Id.* at 439. Although different members of this Court disagreed somewhat as to the specific requirements of meeting these evidentiary burdens, the basic process of burden-shifting was not in dispute.

The Fifth Circuit entirely failed to apply the *Alameda Books* burden-shifting process in its treatment of Reliable's appeal. Instead, it simply rolled the entire analysis into one step, deeming the evidence provided by the City sufficient to justify the regulation. App. 10a. Under this Court's decision in *Alameda Books*, the evidence in this case was, at that point, substantively insufficient to allow the municipality to overcome even its first evidentiary burden. However, even if that evidence had been completely sufficient, the appeals court, applying *Alameda Books*, should have allowed the party challenging the restraint of speech to offer a competing theory. *See* 535 U.S. at 437. Leaving aside all question of the amount or quality of evidence needed to satisfy the first step in the process, the crux of the burden-shifting scheme is that parties challenging a regulation must have a chance to call the municipality's rationale into doubt, either to dispute the connection between the municipality's offered evidence and the regulation or to discredit the municipality's evidence

itself. *See Alameda Books*, 535 U.S. at 438-39. The Fifth Circuit's misapplication of *Alameda Books* and exclusion of the appropriate burden-shifting analysis deprived Reliable of that opportunity.

To be faithful to the dictates of *Alameda Books*, the Fifth Circuit should have conducted a *de novo* analysis of the evidence on both sides, applying the burden-shifting scheme as required by this Court. The City presented evidence to the district court as to the potential secondary effects of take-home-only businesses in an attempt to justify the scope of its ordinance. App. 62-65a. Likewise, Reliable presented evidence below in order to discredit the City's arguments. App. 64a. The circuit court should have analyzed the evidence on both sides according to the process established by this Court in *Alameda Books*. To the contrary, the Fifth Circuit's decision provided only a cursory resolution of the case based solely on the evidence provided by the City, leaving a remarkable void by not properly addressing and applying the burden-shifting process clearly explained by this Court.

The *Alameda Books* framework explained by this Court leaves appellate courts in a similar position as the Fifth Circuit with two plausible options: 1) to conduct a full burden-shifting inquiry *de novo*; or 2) to analyze the district court's analysis at each step of the burden-shifting process, remanding at the point of error for the district court to complete the remainder of the burden-shifting steps. The Fifth Circuit employed neither approach, instead subjecting only the first step – the City's initial burden – to *de novo* review. The court then concluded, based on that step alone, that the City's ordinance is narrowly tailored. App. 10-11a. This is in direct contrast to the Tenth Circuit's decision in *Heideman v. South Salt Lake City*, 165 Fed.Appx. 627, 2006

WL 245160 (10th Cir. Feb. 2, 2006), which expressly requires full *de novo* burden-shifting on appeal. *See id.* at 613, 2006 WL 245160, at *2 ("we view Plaintiffs' claims within the evidentiary burden-shifting framework set out by the Supreme Court in *City of Los Angeles v. Alameda Books, Inc.*") (citations omitted). Other courts applying *Alameda Books* have been noticeably silent as to the precise level of scrutiny to be applied to a district court's ruling, merely reciting that summary judgment decisions are reviewed *de novo* without acknowledging the role of burden-shifting in that analysis. *See, e.g., White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 167, 170 (2nd Cir. 2007) (reviewing summary judgment decision in favor of municipality *de novo* and discussing *Alameda Books* framework without connecting the two standards); *Andy's Restaurant and Lounge, Inc. v. City of Gary*, 466 F.3d 550, 552, 556-57 (7th Cir. 2006) (reviewing the constitutionality of adult business regulation *de novo* and also expressly applying the *Alameda Books* burden-shifting framework). The circuits have therefore adopted divergent viewpoints on the role of burden-shifting in an *Alameda Books* case and this Court should intervene to resolve the dispute.

CONCLUSION

For the reasons discussed in this petition, the Court should issue a writ of certiorari to review the decision of the Fifth Circuit.

This 21st day of June, 2007.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11474, Consolidated with 06-10304

[Filed March 23, 2007]

H AND A LAND CORPORATION; ET AL
Plaintiffs

RELIABLE CONSULTANTS, INC.,
doing business as Dreamer's
Intervenor Plaintiff - Appellee

v.

CITY OF KENNEDALE TEXAS
Defendant - Intervenor Defendant -Appellant

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING

Before SMITH, BENAVIDES AND PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is Denied

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-11474, Consolidated with 06-10304

[Filed February 22, 2007]

H AND A LAND CORP., ET AL,
Plaintiffs,

RELIABLE CONSULTANTS, INC.,
doing business as Dreamer's,
Intervenor Plaintiff-Appellee,

v.

CITY OF KENNEDALE, TEXAS,
Defendant-Intervenor Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Texas, Fort Worth

Before SMITH, BENAVIDES, and PRADO, Circuit Judges.

BENAVIDES, Circuit Judge:

Kennedale, Texas, appeals the district court's grant of summary judgment. We reverse and remand.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This appeal raises a single question: Does the evidence offered by the city of Kennedale sufficiently support its ordinance regulating sexually oriented businesses?

In 1999, Kennedale annexed land that included multiple sexually oriented businesses, thereby subjecting those businesses to the city's ordinances. The ordinances prohibit the operation of sexually oriented businesses within 800 feet of churches, schools, residences, day care centers, parks, and other sexually oriented businesses, as well as within specified overlay districts. Additionally, the ordinances require sexually oriented businesses to obtain a license to operate. In justifying its ordinances, Kennedale relied on (1) studies from nine other cities, (2) an opinion survey of land use appraisers conducted by the city's attorney, and (3) citizen commentary from public meetings, all regarding the harmful secondary effects of sexually oriented businesses on surrounding land uses.

Following annexation, the ordinances allowed affected businesses three years to recoup their investments and relocate. Following criticism that the regulations failed to leave a sufficient number of alternative locations for already existing sexually oriented businesses, the city amended the ordinances to identify specific parcels of land upon which sexually oriented businesses may locate.

Reliable Consultants, Inc., d/b/a "Dreamers" (hereinafter "Reliable") is an off-site store, meaning that it sells video tapes, DVD's, magazines, and other print materials, but that none of the materials can be viewed or consumed on the

premises, and the store offers no live entertainment, viewing booths, or theaters.[1]

After finding the ordinances were content neutral, the district court relied on *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003), to find that the City's evidence of secondary effects failed to show that the ordinances were narrowly tailored to further a substantial government interest. The court declined to consider additional evidence Kennedale offered, and granted Reliable's motion for a permanent injunction. Kennedale appealed.

II. STANDARD OF REVIEW

We review a district court's summary judgment ruling and other legal issues *de novo*. *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162, 172 (5th Cir. 2003). We review a district court's factual findings for clear error. *Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 601 (5th Cir. 2000). The Supreme Court's admonition that cities not justify ordinances by relying on "shoddy data or reasoning," *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 438, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002) (plurality opinion), requires factual findings, but turns on the legal interpretation of what the Supreme Court meant by "shoddy." Therefore, we review a district court's findings as to the existence of a city's evidence for clear error, but we review *de novo* whether that evidence falls within the Supreme Court's admonition.

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[1] Originally, there were five affected sexually oriented businesses/plaintiffs, but all but one settled during the course of litigation, leaving Reliable as the lone plaintiff-appellee.

III. DISCUSSION

"Zoning regulations restricting the location of adult entertainment businesses are considered time, place, and manner restrictions . . . if they do not ban [adult-entertainment] businesses throughout the whole of a jurisdiction and are 'designed to combat the undesirable secondary effects of such businesses' rather than to restrict the content of their speech per se." *Encore Videos*, 330 F.3d at 291 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986)) (citing *Lakeland Lounge v. Jackson*, 973 F.2d 1255, 1257-58 (5th Cir. 1992)). Time, place, and manner restrictions on speech violate the First Amendment unless they are content-neutral, are designed to serve a substantial governmental interest, do not unreasonably limit alternative avenues of communication, and are narrowly tailored. *See Encore Videos*, 330 F.3d at 291-92.

Kennedale's ordinances meet the narrow tailoring standard if they "target[] and eliminate[] no more than the exact source of the evil [they] seek[] to remedy." *Encore Videos*, 330 F.3d at 293; *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988). Thus, an ordinance meant to deter property depreciation may only regulate businesses for which a connection to property depreciation can be demonstrated.

To show that an ordinance advances its goals, a city "may rely on any evidence that is 'reasonably believed to be relevant.'" *Alameda Books*, 535 U.S. at 438. However, "[t]his is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must

fairly support the municipality's rationale for its ordinance." *Id.* at 438.[2]

On-site businesses (i.e., adult theaters or strip clubs) pose a greater threat of secondary effects than off-site sexually oriented businesses (i.e., adult bookstores).[3] Therefore, a city that enforces an ordinance meant to prevent harmful secondary effects associated with the operation of an off-site business must rely on evidence showing that off-site businesses, rather than the broader category of sexually oriented businesses that includes on-site businesses, cause harmful secondary effects. *Encore Videos,* 330 F.3d at 295 (requiring city to "provide at least some substantial evidence of secondary effects specific to adult businesses that sell books or videos solely for off-site entertainment" to meet narrow tailoring requirement).

In *Encore Videos*, we invalidated San Antonio's ordinance regulating sexually oriented businesses because the city failed to present adequate evidence showing a connection between off-site businesses and harmful secondary effects. San Antonio's evidence consisted of three studies conducted in other cities showing a connection between sexually oriented

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[2] Though this was a plurality opinion, a review of the concurrences and dissent demonstrates that the Court would unanimously support this admonishment.

[3] *See Encore Videos*, 330 F.3d at 295 ("Off-site businesses differ from on-site ones, because it is only reasonable to assume that the former are less likely to create harmful secondary effects. If consumers of pornography cannot view the materials at the sexually oriented establishment, they are less likely to linger in the area and engage in public alcohol consumption and other undesirable activities.")

businesses, without isolating off-site businesses and secondary effects. *Encore Videos*, 330 F.3d at 294-95. Those studies did not provide any information exclusive to off-site businesses, so a substantial portion of the ordinance's burden on speech did not serve to advance its goals, and it failed the narrow tailoring prong. *Id.* at 295.

This case differs from *Encore Videos* because Kennedale, unlike San Antonio, offers evidence that purports to show a connection between purely off-site businesses, or "bookstores," and harmful secondary effects. To determine whether the ordinance at issue is narrowly tailored, we must determine whether Kennedale could reasonably believe that the evidence is relevant to show the requisite connection to harmful secondary effects. *Alameda Books*, 535 U.S. at 438. In other words, we ask whether that evidence "fairly support[s] the [city's] rationale for its ordinance." *Id.* Applying our holding from *Encore Videos*, Kennedale cannot reasonably believe its evidence is relevant unless it sufficiently segregates data attributable to off-site establishments from the data attributable to on-site establishments. *Encore Videos*, 330 F.3d at 294-95.

Kennedale's evidence consisted of studies from nine cities, as well as an opinion survey of land use appraisers conducted by the city's attorney, and citizen commentary from public meetings. Seven of Kennedale's nine studies from other cities fail to differentiate between on-site and off-site businesses. The 1984 Indianapolis and 1986 Oklahoma City studies, however, included surveys of real estate appraisers that focused strictly on "adult bookstores." The overwhelming majority of survey respondents in both studies predicted that the presence of an adult bookstore would negatively affect real estate value in the surrounding area. The Indianapolis survey, conducted by the City of Indianapolis in conjunction with

Indiana University School of Business, Division of Research, polled 20% of the national membership of the American Institute of Real Estate Appraisers.[4] Eighty percent of the respondents predicted that an adult bookstore would negatively impact residential property values, and seventy-two percent believed commercial property value would also be negatively effected. The Oklahoma City study, which surveyed one hundred Oklahoma City real estate appraisers, produced similar results: Seventy-four percent predicted a negative impact on real estate value in the surrounding area.

Appellee Reliable argues that the term "bookstore," used in both surveys, is a term of art and does not sufficiently specify off-site premises. They argue instead that adult bookstores often include peep shows, arcades, and other forms of on-site entertainment, rendering them on-site establishments. However, the Supreme Court has previously used the term "bookstore" as distinguishable from "adult video arcades." *Alameda Books*, 535 U.S. at 442 (discussing city's prohibition on "combination of adult bookstores and arcades"). This was a survey sent to and completed by real estate appraisers, and so what matters is how those appraisers would have understood the survey's reference to an adult bookstore.

Standing alone, it is reasonable to infer that the survey respondents interpreted "bookstore" as signifying an off-site establishment. Webster's Dictionary defines "bookstore" as "a place of business where books are the chief stock in trade." WEBSTER'S NEW INT'L DICTIONARY 253 (3d ed. 1981). There is no reason to expect that simply adding the word

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[4] In the Indianapolis study, 1527 questionnaires were mailed, and 507 (33%) were returned.

"adult" to the term would completely transform the nature of the business activity described. Moreover, the Indianapolis survey also asked respondents to explain their prediction that an adult bookstore would negatively impact property value: 29% believed such an establishment would attract "undesirables" to the neighborhood, 14% felt it would create a bad image of the area, and 15% felt that it offended prevailing community attitudes. These reasons are equally applicable to an on-site or off-site establishment, and are distinguishable from the problems we have found to be unique to on-site businesses. *See Encore Videos,* 330 F.3d at 295 ("If consumers of pornography cannot view the materials at the sexually oriented establishment, they are less likely to linger in the area and engage in public alcohol consumption . . . ."). It is reasonable for Kennedale to believe that the appraisers responding to the survey understood the term "adult bookstore" to mean off-site businesses, such as that operated by the plaintiff-appellee.

Kennedale's ordinances purport to protect against harmful secondary effects. The Indianapolis and Oklahoma City studies support the belief that off-site sexually oriented businesses cause harmful secondary effects to the surrounding area in the form of decreased property value. So long as they are not relying on shoddy data or reasoning, we afford substantial deference to cities with regards to the ordinances they enact. *See Alameda Books,* 535 U.S. at 451 (Kennedy, J., concurring) (noting that "a city must have latitude to experiment" and "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners"). The Indianapolis survey, in particular, was drafted by experts, pretested, and administered to a large, national pool of respondents. It is not "shoddy." We therefore find that Kennedale has produced evidence that it could have reasonably believed was relevant, and thus could have

properly relied upon. The ordinances are narrowly tailored to advance a substantial governmental interest.

The other evidence produced by Kennedale to justify its ordinance—an opinion survey of land use appraisers conducted by the city's attorney, and citizen commentary from public meetings—has also been hotly debated by the parties. Given our findings above, however, we need not reach that additional evidence. Similarly, our finding moots the question of whether the district court erred in excluding additional evidence of secondary effects.

By finding that Kennedale's ordinances were not narrowly tailored, the district court never reached the final element of the time, place, and manner analysis: whether the ordinances unreasonably limit alternative avenues of communication. We therefore remand this case to the district court to make those findings.

IV. CONCLUSION

For the foregoing reasons, we REVERSE the district court's summary judgment and remand for findings as to whether the ordinances leave open sufficient alternative channels of communication.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4:02-CV-458-Y
(Consolidated with 4:02-CV-471-Y)

[Filed February 8, 2006]

H AND A LAND CORPORATION d/b/a/ SHOWTIME CABARET, et al.	)
VS.	)
CITY OF KENNEDALE, TEXAS	)

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING PLAINTIFF-INTERVENOR'S MOTION FOR ATTORNEY FEES AND COSTS

Pending before the Court is plaintiff-intervenor Reliable Consultants, Inc., d/b/a/ Dreamer's ("Reliable")'s Motion for Attorney Fees and Costs [doc. # 238], filed November 7, 2005. Having carefully considered the motion, response, and reply, the Court concludes that the motion should be PARTIALLY GRANTED and PARTIALLY DENIED.

This suit involves a series of zoning ordinances ("the ordinances") passed by defendant City of Kennedale, Texas

("Kennedale") that affect Dreamer's, an adult bookstore owned by Reliable. The ordinances effectively prohibited Dreamer's from operating in its current location. In its complaint, Reliable asserted constitutional claims pursuant to 42 U.S.C. § 1983. Reliable requested a declaratory judgment that Kennedale's ordinances were unconstitutional on their face due to prior restraint; imposed improper time, place, and manner restrictions; constituted a taking of private property; and were content-based restrictions on speech. Reliable also sought a permanent injunction, just compensation for the taking of its private property, and attorneys' fees.

On March 29, 2005, the Court entered an order partially granting and partially denying the parties' cross motions for summary judgment. Specifically, the Court awarded Kennedale summary judgment on "counts" two, four, five, and seven of Reliable's complaint, meaning that Kennedale prevailed on Reliable's claims that the ordinances constituted a prior restraint and a taking of private property, and restricted speech based on content. The Court awarded Reliable summary judgment on count three of its complaint, concluding that the ordinances failed the narrow-tailoring prong of the requisite time-place-and-manner test, and thus were unconstitutionally applied to Reliable.[1] (March 29, 2005, Order at 21-25.) Because the Court reached this conclusion, it did not address whether the ordinances left open alternative avenues of communication. (*Id.* at 25, n.12.) The Court also granted Reliable's request for a permanent

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[1] Time, place, and manner restrictions on speech violate the First Amendment unless they are content-neutral, are designed to serve a substantial governmental interest, do not unreasonably limit alternative avenues of communication, and are narrowly tailored. *See Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 290-91 (5th Cir. 2003).

injunction but noted that the injunction did not prevent Kennedale from amending its ordinances to come within the requirements of the Constitution, if it could do so.

Prior to rendering its decision on the cross motions for summary judgment, the Court struck the expert testimony of Bruce McLaughlin, Reliable's expert witness, because of Reliable's failure to comply with the Federal Rules of Evidence and the Court's scheduling order. That expert's testimony was primarily directed towards the alternative-avenues-of-communication issue.

Reliable now moves for attorney fees and costs pursuant to 42 U.S.C. § 1988(b), which provides that the Court may, in its discretion, allow a prevailing party a reasonable attorney's fee as part of the costs in an action to enforce 42 U.S.C. § 1983. Although § 1988 uses the word "may," the court's discretion to deny attorney's fees to a prevailing party is extremely narrow: "the prevailing party 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989) (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)); *see also Scham v. Dist. Courts Trying Criminal Cases*, 148 F.3d 554, 557 (5th Cir. 1998). "Absent special circumstances that would render such an award unjust, a prevailing plaintiff should be awarded § 1988 fees 'as a matter of course." *Scham*, 148 F.3d at 557 (quoting *Espino v. Besteiro*, 708 F.2d 1002, 1005 (5th Cir. 1983)).

"To qualify as a prevailing party, the plaintiff must (1) obtain actual relief, such as an enforceable judgment or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendant's behavior

in a way that directly benefits the plaintiff at the time of the judgment or settlement." *Walker v. City of Mesquite*, 313 F.3d 246, 249 (5th Cir. 2002) (citing *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). Based on this definition, there can be no doubt that Reliable is the prevailing party in this case. Reliable prevailed on its application for a preliminary injunction and on the narrowtailoring question. Moreover, because Reliable prevailed nearly to the greatest extent that it could have prevailed (since the Court's ruling precluded Kennedale from enforcing the ordinances as they were against Reliable), the Court must award to Reliable the great portion of the fees that it requests.[2]

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[2] While it is true that "work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved,'" it is also true that:

> [some cases will] involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. *In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. See Davis v. County of Los Angeles, supra*, at 5049. Litigants in good faith may raise alternative legal grounds for a desired outcome, and

To calculate the amount of a reasonable attorney's fee, the court begins by "determining the compensable hours from the attorneys' time records, including only hours reasonably spent." *Shipes v. Trinity Indus.*, 987 F.2d 311, 319 (5th Cir. 1993). The court may reduce the number of compensable hours "where the documentation of hours is inadequate." *Hensley*, 461 U.S. at 433. The court also excludes any hours that it determines "are excessive, redundant, or otherwise unnecessary." *Id.* at 434. Next, the Court "must select an appropriate hourly rate based on prevailing community standards for attorneys of similar experience in similar cases." *Shipes*, 987 F.2d at 319. "The number of compensable hours is then multiplied by the selected hourly rate to produce the lodestar amount." *Id.*; *see also Rutherford v. Harris County, Tex.*, 197 F.3d 173, 192 (5th Cir. 1999) (citing *League of United Latin Am. Citizens # 4552 v. Roscoe Indep. Sch. Dist.* ("*LULAC*"), 119 F.3d 1228, 1232 (5th Cir. 1997)). The fee applicant bears the burden of substantiating both the requested hours and the hourly rate. *Hensley*, 461 U.S. at 437. After calculating the lodestar amount, the court must then determine whether the lodestar should be adjusted based on the factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Shipes*, 987 F.2d at 320.

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the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.

Hensley, 461 U.S. at 435 (quoting *Davis v. County of Los Angeles*, 8 E. P. D. para. 9444, at *5049 (CD Cal. 1974)) (emphasis added).

Reliable requests compensation for 829.65 hours of services performed by Reliable's counsel and their staff.[3] While the majority of these hours are properly documented and are reasonable, there are a few instances where a reduction must be made. First, the instant motion is Reliable's second attempt to recover fees and costs from Kennedale; the Court denied the first because Reliable insufficiently substantiated its request. Reliable should not be compensated for the expenses it incurred in preparing the first motion for attorney's fees. Kennedale should not be forced to bear the financial cost of Reliable's failure to properly move for fees and costs. However, the Court is aware that portions of the work done in preparation of the first motion for fees undoubtedly shortened Reliable's preparation time and expenses in preparing its amended motion. Consequently, the Court will figure the total amount of time spent by Reliable in preparing **both** of its motions for attorneys fees and costs and then reduce that amount by 30%. *See Barrow v. Greenville Indep. Sch. Dist. ("Barrow II")*, Civil Action No. 3:00-CV-0913-D, 2005 U.S. Dist. LEXIS 34557, at *40 (N.D. Tex. Dec. 20, 2005) (Fitzwater, J.) ("it is impossible to conduct meaningful review and determine the precise number of hours that should be reduced in each time entry due to vague descriptions. The court has therefore attempted to reach a fair determination by alternate means.") (citation omitted).

Second, Reliable is not entitled to recover those fees related to McLaughlin's expert testimony. Since the Court sanctioned Reliable for its failure to comply with the Court's

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[3] Reliable's motion requests reimbursement for 819.25 hours of services; its reply requests reimbursement for an additional 10.4 hours of services.

scheduling order and the Federal Rules of Evidence by striking McLaughlin's testimony, Reliable should not recover the fees and costs related to McLaughlin's service as their expert. To rule otherwise would effectively place onto Kennedale the financial burden of paying for McLaughlin's participation in this suit, moving to strike his testimony, and defending against striking that testimony. Given the result reached, Kennedale should not have to shoulder such a burden.

Third, in some instances, Reliable's motion contains vague entries. For example, there are several references to "motions to strike." There were several motions to strike in this cause, however, one of which concerned McLaughlin. Reliable's reference to "motions to strike" generally is too vague to award the full costs requested, especially given that some of those fees are likely in relation to McLaughlin. Consequently, the Court will reduce by 20% references to "motions to strike." *See Hensley*, 461 U.S. at 433 ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly."); *Hopwood v. Texas*, 236 F.3d 256, 279 (5th Cir. 2000) (affirming 25% reduction in fee award based, *inter alia*, on inadequate documentation); *LULAC*, 119 F.3d at 1233 ("District courts enjoy broad discretion to exclude or reduce hours based on insufficient documentation. . . ."). Secondly, though Reliable moves for substantial fees and costs related to Gary Polozola's representation in this cause as local counsel, Polozola's records are too vague to grant the full amount requested.[4]

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[4] Attached to Polozola's affidavit is one chart listing Polozola's fees and costs by month; following that chart are the month-by-month bills for Polozola's services in this case. Reliable argues that it is not requesting fees for all of Polozola's services. Moreover,

Having fairly reviewed the record and the documents attached to Polozola's affidavit, and taking into account the matters that the Court has already concluded that it would exclude from the computation, the Court concludes that it is appropriate to reduce Polozola's hourly award by 35%.[5]

Given all of the above, the Court deems the following award appropriate: compensation for 74.5 hours of H. Louis Sirkin's services; compensation for 220.2 hours of Jennifer M. Kinsley's services; compensation for 141.1 hours of staff

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the chart indicating monthly totals does not match the monthly bills, making it clear that Reliable is not requesting reimbursement for the total of Polozola's services. Nowhere, however, (at least to which the Court was directed) does Reliable indicate which fees and services qualify for § 1988 relief and thus fall within Reliable's request for fees and costs. Reliable cannot succeed where there is such vague substantiation. Further, the Court notes that the only documentation it has regarding the substantive portions of Polozola's services are his monthly bills, which often contain vague entries. As previously discussed, where there are vague entries the Court is not required to grant attorneys fees. *See Hensley*, 461 U.S. at 433.

[5] Kennedale argues that it should not be liable for Reliable's costs in avoiding state-court liability for violating the ordinances. Reliable's case, however, would most certainly have been weakened had it not vigorously prosecuted its defense in state court. For instance, failing to defend itself in state court would necessarily have weakened Reliable's argument that it would suffer irreparable harm should it have to close or move locations within Kennedale, since Reliable likely would have needed to close or relocate had it not defended itself. *See Castellano v. Fragozo*, 311 F.3d 689, 711 (5th Cir. 2002), *rev'd other grounds*, 352 F.3d 939 (5th Cir. 2003).

services; and compensation for 214.73 hours of Polozola's services.

Next the Court must determine the hourly rates for the services awarded above. Reasonable fees under § 1988 "are to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Where an out-of-state attorney performs work in an in-state forum, the relevant community for determining the prevailing market rate will generally be that found in the relevant district within the instate forum. *See Hopwood*, 236 F.3d at 281. However, "where . . . a plaintiff can show he has been unable through diligent, good faith efforts to retain local counsel, attorney's fees under 42 U.S.C. § 1988 are not limited to the prevailing rate in the district where the case is tried." *Donaldson v. O'Connor*, 454 F. Supp. 311, 315 (N.D. Fla. 1978).

Once the relevant community is determined, a court must also determine an appropriate market rate, since "[t]he type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively--even within a law firm." *Blum*, 465 U.S. at 895 n.11. Thus, "[t]o inform and assist the court in the exercise of its discretion [in determining an appropriate market rate], the burden is on the fee applicant to produce satisfactory evidence--in addition to the attorney's own affidavits--that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* (emphasis added).

Reliable requests $300 per hour for Sirkin's services, $200 per hour for Kinsley's services, $50 per hour for their clerks' services, and $150 per hour for Polozola's services. Having reviewed the affidavits submitted with the motion, the

Court deems these fees to be reasonable. While Sirkin and Kinsley practice in Ohio and Reliable has not demonstrated that it tried through diligent efforts to hire lead counsel from this community, the fees requested are in line with those prevalent in this community.[6] Many of the requested fees, however, were billed to Reliable when Sirkin and Kinsley charged a lower rate, $275 an hour and $175 an hour respectively. It appears that Sirkin and Kinsley changed their rates at the beginning of 2005. The Court will therefore respectively award Sirkin and Kinsley $275 and $175 an hour for their services prior to 2005 and $300 and $200 an hour for their services after.[7] Polozola should be compensated at his requested rate of $150 an hour and Sirkin's and Kinsley's clerks should be compensated at $50 an hour.

Finally, having considered the necessary *Johnson* factors, the Court concludes that a reduction of the lodestar fee is unwarranted. Consequently, Reliable is entitled to the

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[6] Reliable argues that no other attorneys specializing in First-Amendment issues were available in the Fort Worth area; it did not specify whether such attorneys were available in Dallas. Nevertheless, just because Reliable wanted a specialist does not mean that Reliable should be entitled to compensation for a specialist when there may have been other competent, though not as qualified, attorneys from this community who could have performed the necessary service. *See ACLU v. Barnes*, 168 F.3d 423, 438 (11th Cir. 1999).

[7] Of the hours awarded, Sirkin requests fees for 4.3 hours of services performed in 2005, none of which are subject to the reductions taken by the Court, making his award at the $300-an-hour rate $1,290.00. Kinsley requests fees for 41.2 hours of services performed in 2005 (including the reductions taken by the Court), making her award at the $200-an-hour rate $8,240.00.

following in attorneys fees: $20,595.00 for Sirkin's services; $40,965.00 for Kinsley's services; $7,055.00 for clerks' services; and $32,209.50 for Polozola's services. Thus, the total award for fees is $100,824.50.

Reliable also requests that the Court grant it $65,938.41 in costs for mediation, photocopies, travel expenses, excess postage, expert fees, and architect-and-design expenses.[8] "[A]ll reasonable out-of-pocket expenses, including charges for photocopying, paralegal assistance, travel, and telephone, are plainly recoverable in section 1988 fee awards because they are part of the costs normally charged to a fee-paying client." *Assoc. Builders & Contractors, Inc. v. Orleans Parish School Bd.*, 919 F.2d 374, 380 (5th Cir. 1990) (citing *Int'l Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174, 1185 (5th Cir. 1986); *Mo. v. Jenkins*, 491 U.S. 274, 109 S. Ct. 2463, 2470 (1989)). As already discussed above, Reliable is not entitled to compensation for its expert costs in relation to McLaughlin.[9] Other than that expenditure, however, the Court considers Reliable's cost requests to be reasonable. Consequently, the Court concludes that an award of $45,421.20 in costs is appropriate. This makes Reliable's total recovery $146,245.70.

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[8] Such costs are not recoverable under 28 U.S.C. § 1920. *See Barrow II*, 2005 U.S. Dist. LEXIS 34557, at *80-87 (citations omitted).

[9] While Kennedale opposes an award of any costs to Reliable concerning architect-and-design fees, Kennedale informed Reliable that it stood a better chance of remaining in its location despite the ordinances if it had demonstrative evidence of a new building. (Pl.'s App. to Mot. at 59, ¶ 15.) Given this, Reliable is entitled to reimbursement for its costs in hiring an architect to create such demonstrative evidence.

Therefore, Reliable's Motion for Attorney Fees and Costs [doc. # 238] is PARTIALLY GRANTED and PARTIALLY DENIED: GRANTED in that Reliable is awarded $100,824.50 in attorneys' fees and $45,421.20 in costs, making their total recovery pursuant to 42 U.S.C. § 1988 $146,245.70; DENIED in all other respects.

SIGNED February 8, 2006.

/s/
TERRY R. MEANS
UNIED ATATES DISTRICT JUDGE

TRM/kat

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Case No. 4:02-CV-0458-Y

[Filed November 7, 2005]

H AND A LAND CORP. *Et Al.*, Plaintiffs,	)
v.	)
CITY OF KENNEDALE, TEXAS, Defendant.	)

PLAINTIFF-INTERVENOR RELIABLE CONSULTANTS, INC.'S MOTION FOR ATTORNEY FEES AND COSTS

Pursuant to 42 U.S.C. § 1988, Plaintiff-Intervenor Reliable Consultants, Inc., by and through counsel, respectfully moves the Court for an order awarding attorney fees of $131,605.00 and costs in the amount of $65,938.41. This motion is supported by a separately filed brief and appendix.

Respectfully submitted,

/s/ Jennifer M. Kinsley
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JENNIFER M. KINSLEY (Ohio Bar No. 0071629)
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Counsel for Plaintiff-Intervenor
Reliable Consultants, Inc. d/b/a Dreamer's

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Case No. 4:02-CV-0458-Y (Judge Means)

H AND A LAND CORP. *Et Al.*,	)
Plaintiffs,	)
	)
v.	)
	)
CITY OF KENNEDALE, TEXAS,	)
Defendant.	)
	)

ORDER GRANTING PLAINTIFF-INTERVENOR RELIABLE CONSULTANTS, INC.'S MOTION FOR ATTORNEY FEES AND COSTS

This Court having previously granted summary judgment in part for Plaintiff-Intervenor Reliable Consultants, Inc. hereby finds that Reliable Consultants, Inc. is a prevailing party and is therefore entitled to attorney fees and costs pursuant to 42 U.S.C. § 1988. The Court awards attorney fees and costs as follows:

1. Fees for H. Louis Sirkin and Jennifer M. Kinsley in the amount of $82,052.50. This figure has been computed applying hourly rates of $300 per hour for Mr. Sirkin, $200 per hour for Ms. Kinsley, and $50 per hour for law clerks and other associates employed by the Sirkin Pinales & Schwartz LLP firm;

2. Expenses for H. Louis Sirkin and Jennifer M. Kinsley in the amount of $24,454.56;

3. Fees for Gary Polozola in the amount of $49,552.50. This figure has been computed applying an hourly rate of $150 per hour for Mr. Polozola;

4. Expenses for Gary Polozola in the amount of $970.74; and

5. Expenses incurred directly by Reliable Consultants, Inc. in the amount of $40,513.11.

As a result, a total of $197,543.41 in attorney fees and expenses shall be assessed against Defendant City of Kennedale.

It is so ordered.

_____

Judge Means
United States District Court
Northern District of Texas

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4:02-CV-458-Y
(Consolidated with 4:02-CV-471-Y)

[Filed October 24, 2005]

H AND A LAND CORPORATION	)
d/b/a/ SHOWTIME CABARET, et al.	)
	)
VS.	)
	)
CITY OF KENNEDALE, TEXAS	)
	)

JUDGES: TERRY R. MEANS, UNITED STATES DISTRICT JUDGE.

ORDER DENYING DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

Pending before the Court is defendant City of Kennedale, Texas ("Kennedale")'s Motion to Alter or Amend Judgment [doc. # 186], filed April 12, 2005. Having carefully considered the motion, response, and reply; the Court concludes that the motion should be DENIED.

This suit involves a series of zoning ordinances ("the ordinances") in Kennedale that affect Dreamer's, an adult bookstore owned by plaintiff-intervenor Reliable Consultants, Inc. ("Reliable"). The ordinances effectively prohibit Dreamer's from operating in its current location. Kennedale presently moves for the alteration or amendment of the Court's March 29 order granting summary judgment to Reliable on the issue of whether the ordinances are constitutional time, place, and manner restrictions as applied to Dreamer's. The Court concluded that the ordinances failed the narrow-tailoring prong of the requisite time-place-and-manner analysis, and thus were unconstitutionally applied to Reliable, because there was not substantial evidence of the secondary effects of sexually-oriented businesses selling adult products solely for off-site consumption.[1] (March 29, 2005, Order at 21-25.) Such a showing is necessary pursuant to the Fifth Circuit's decision in *Encore Videos*. *See* 330 F.3d at 295.

Altering, amending, or reconsidering a judgment pursuant to Federal Rule of Civil Procedure 59(e) is an extraordinary measure that courts should use sparingly.[2] See *Templet v. Hydrochem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). The

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[1] Time, place, and manner restrictions on speech violate the First Amendment unless they are content-neutral, are designed to serve a substantial governmental interest, do not unreasonably limit alternative avenues of communication, and are narrowly tailored. *See Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 290-91 (5th Cir. 2003).

[2] Kennedale's motion is properly brought pursuant to Rule 59(e) because it was filed within ten days after the order of which Kennedale seeks alteration or amendment. *See* FED. R. CIV. P. 6(a) & 59(e) (West 2005).

remedy is so extraordinary that the standard under Rule 59(e) "favors denial of motions to alter or amend a judgment." *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993) (citation omitted). Accordingly, relief pursuant to that rule should only be granted where the moving party has presented substantial reasons for reconsideration. *See Baustian v. La.*, 929 F. Supp. 980, 981 (E.D. La. 1996). Consequently, a "district court has considerable discretion in deciding whether to reopen a case under Rule 59(e)." *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993); *see also Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990).

There are three grounds for altering or amending a judgment: (1) to accommodate an intervening change in controlling law, (2) to account for new evidence not available at trial, and (3) to correct a clear error of law or prevent manifest injustice. *See Schiller v. Physicians Res. Group, Inc.*, 342 F.3d 563, 567 (5th Cir. 2003) (citation omitted); *Benjamin Moore & Co. v. Borden (in Re Benjamin Moore & Co.)*, 318 F.3d 626, 629 (5th Cir. 2002). A Rule 59(e) motion should not be used to relitigate prior matters that should have been urged earlier or that simply have been resolved to the movant's dissatisfaction. *See Templet*, 367 F.3d at 479 (citation omitted); *Schiller*, 342 F.3d at 567; *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990); *In re Self*, 172 F.Supp.2d 813, 816 (E.D. La. 2001). Nor can such motions be used to argue a case under a new legal theory. *Dial One of the Mid-South, Inc. v. Bellsouth Telcoms., Inc.*, 401 F.3d 603, 607 (5th Cir. 2005) (citation omitted). Kennedale rests on the last two grounds for its motion: the presentation of new evidence and the Court's clear error in concluding that the ordinances were not narrowly tailored.

There is no precise definition in the law for what constitutes "clear error," though its clear that any analysis of clear error should conform to a "very exacting standard." *Hopwood v. Texas*, 236 F.3d 256, 272 (5th Cir. 2000) (regarding "clearly erroneous" standard in reviewing district-court decisions generally); *see also Esparza v. Telerx Mktg.*, EP-04-CA-0241-FM, 2005 U.S. Dist. LEXIS 12328, at * 3 (W.D. Tex. June 21, 2005) (citing *Lightfoot v. District of Columbia*, 355 F. Supp. 2d 414, 422 (D.D.C. 2005)) (incorporating "exacting standard" into district court's analysis of Rule 59(e) motions). "[D]istrict courts should have 'a clear conviction of error' before finding that a . . . judgment was predicated on clear error." *Lightfoot*, 355 F. Supp. 2d at 422 (citing *Piper v. United States DOJ*, 312 F. Supp. 2d 17, 21 (citing *Oneida Indian Nation v. Co. of Oneida*, 214 F.R.D. 83, 98 (N.D.N.Y. 2003)). In essence, a judgment must be "dead wrong" to qualify as being clearly erroneous. *Id.* (citing *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

Kennedale argues that the Court's judgment was clearly erroneous since Kennedale did present substantial evidence of the secondary effects of off-site adult-entertainment businesses and because the Court engaged in a *Daubert*-style analysis of an informal survey Kennedale offered in support of its case.[3] Neither of these arguments is persuasive. First, the Court has already weighed the evidence presented by Kennedale and

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[3] The reference to *Daubert* is to the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), which held that courts must perform a gate-keeping function for experts and exclude testimony that is irrelevant or does not result from the application of reliable methodologies or theories to the facts of the case. *See* 509 U.S. at 592-95.

concluded that it did not comport with the Fifth Circuit's instructions in *Encore Videos*. Simple disagreement by Kennedale with the Court's decision does not warrant a Rule 59(e) re-opening of the issue. *See In re Self*, 172 F.Supp.2d at 816. Nor has Kennedale made arguments demonstrating that the Court's interpretation of *Encore Videos* was "dead wrong." *See Lightfoot*, 355 F. Supp. 2d at 422 (citing *Parts & Elec. Motors*, 866 F.2d at 233). Should the Fifth Circuit wish to clarify its mandate, it may do so, but the Court is not in a position to ignore that mandate, and the Court's reasons for concluding that the requirements of *Encore Videos* are unmet remain the same.

Moreover, the Court did not conduct a *Daubert-style* analysis of Kennedale's survey. Instead, the Court merely pointed out the many flaws extant in the survey's formulation and results. As previously discussed by the Court in its March 29 order, when enacting an ordinance that limits free expression, a city may rely on "any evidence that is 'reasonably believed to be relevant,'" but may not use "shoddy data or reasoning" in doing so. *City of L.A. v. Alameda Books*, 535 U.S. 425, 428, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). In its March 29 order the Court merely questioned whether Kennedale could reasonably rely upon a survey exhibiting as many flaws as the survey used here. Posing such a question is not tantamount to subjecting the survey to a *Daubert* analysis. Nor in doing so did the Court require clear proof of secondary effects or substitute its findings for those of Kennedale's legislative body. Were the Court wholly unable to question whether the data relied upon by Kennedale was shoddy, the Supreme Court's cautioning that a city cannot rely upon shoddy data would be meaningless.

Furthermore, the Court's order, fairly viewed, establishes that the Court did not base its decision upon the seeming flaws in the formulation of Kennedale's survey. Rather, the Court rested its conclusion upon the survey's failure to properly limit its enquiry to off-site adult-entertainment establishments. Simply because Kennedale disagrees with that conclusion does not compel reconsideration of the issue. Nor has Kennedale demonstrated that the Court's conclusion was clearly erroneous or dead wrong since Kennedale's arguments merely consist of its own opinion regarding the interpretation of the survey. The Court has already rendered judgment on that issue and Kennedale's opinion on the matter is not enough, alone, to demonstrate the clear erroneousness of the Court's earlier conclusion.

Kennedale also argues that newly discovered evidence supports alteration of the Court's March *29* decision. When taking up a motion under Rule 59(e) it is within the Court's discretion to view materials not available at the time of its challenged decision. *See Ford Motor Credit Co. v. Bright*, 34 F.3d 322, 324 (5th Cir. 1994). In deciding whether to use its discretionary authority to reopen a case, a court must balance between two competing interests: "the need to bring litigation to an end and the need to render just decisions on the basis of all the facts." *Lavespere*, 910 F.2d at 174; *see also Freeman v. County of Bexar*, 142 F.3d 848, 853 (5th Cir. 1993). A district court is therefore tasked with striking the proper balance between these competing interests by considering, among other things, "[t]he reasons for the moving party's default, the importance of the omitted evidence to the moving party's case, whether the evidence was available to the non-movant before she responded to the summary judgment motion, and the likelihood that the nonmoving party will suffer unfair prejudice if the case is reopened." *Id.*

The Court declines to use its discretion and reopen the instant matter based upon the newly proffered evidence. Kennedale already had an opportunity to prove its point during the summary-judgment phase of this case, but it failed even to raise a genuine issue of material fact regarding the pertinent issues. Moreover, the newly proffered evidence is countered by new evidence adduced by Reliable. Nor has Reliable had an adequate opportunity to respond to Kennedale's new evidence through discovery. Furthermore, since the discovery period in this cause has already lapsed, Reliable will undoubtedly suffer unfair prejudice should the Court reopen the case and examine the new evidence adduced by Kennedale.

This matter has been pending for over three years. At some point, there must be a conclusion to the litigation and finality accorded to the Court's judgment. Otherwise, either party could, without end, petition the Court to reopen the matter. Consequently, the Court concludes that relief pursuant to Rule 59(e) is unwarranted.

Kennedale also asks the Court to modify its March 29 order as it relates to plaintiff-intervenor Beverly van Dusen, d/b/a B & V Video Enterprises d/b/a "New Video" ("B & V") since Kennedale and B & V settled their dispute on October 15, 2004. While Kennedale and B & V may have settled their dispute prior to the Court's ruling on Kennedale's summary-judgment motion, which was directed towards B & V's claims, B & V did not file dismissal papers with the Court until April 7, 2005. Nor did Kennedale file a motion to withdraw those portions of its summary-judgment motion that related to B & V. The Court cannot retroactively apply the dismissal. Moreover, such treatment is especially unjustified here, where neither of the parties treated their settlement agreement as being important enough to warrant notifying the

Court. On March 29 B & V's claims were still pending before the Court. Consequently, there is no basis for modifying the Court's order issued that same day.

Kennedale also requests clarification of the Court's March 29 order, in which the Court specifically declined to review whether the ordinances left open alternative avenues of communication since analysis of that issue was unnecessary due to the Court's ruling on narrow tailoring. Later in its order, when analyzing Reliable's permanent-injunction request, the Court stated that "Dreamer's has operated in its current location for twenty-five years and currently has no sites to which it may relocate." (March 29, 2005, Order at 28.) The Court did not mean to imply a ruling on the alternative-avenues-of-communications question; it merely intended to draw attention to the fact that Reliable owned the land on which it was located and did not presently own, nor was it renting or leasing, any other land to which it could immediately relocate. Any other potential meaning that could be gleaned from the Court's statement is unintended.

The March 29 order also stated that the permanent injunction granted therein did not prevent Kennedale from amending its ordinances to come within the requirements of the Constitution, if it could do so. (*Id.*) Kennedale presently moves the Court to discuss whether Kennedale's newly proffered evidence would permit Kennedale to constitutionally pass an ordinance restricting sexually-oriented businesses such as Reliable. Kennedale also seeks clarification regarding its non-locational licensing regulations. The Court cannot grant the requested relief, however, because federal courts cannot issue advisory opinions. *See Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461, 65 S. Ct. 1384, 89 L. Ed. 1725 (1945); *C & H Nationwide v. Norwest Bank Tex. N.A.*, 208 F.3d 490, 493 (5th Cir. 2000); *Halder v. Standard Oil Co.*,

642 F.2d 107, 110 (5th Cir. 1981) (citing *McAdory*, 325 U.S. at 461); *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003).

Therefore, Kennedale's Motion to Alter or Amend Judgment [doc. # 186] is DENIED.

SIGNED October 24, 2005.

/s/
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/kat

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4:02-CV-458-Y
CONSOLIDATED w/4:02-CV-471-Y

[Filed April 12, 2005]

H AND A LAND CORPORATION, ET AL.	)
	)
vs.	)
	)
CITY OF KENNEDALE, TEXAS	)
	)

DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant City of Kennedale, Texas, and pursuant to Rule 59(e) of the Federal Rules of Civil Procedure submits its Motion to Alter or Amend the Order on Motion for Summary Judgment filed on March 29, 2005, and the Rule 54(b) Final Judgment, filed on March 30, 2005 and would respectfully show this Honorable Court as follows:

I.

Defendant respectfully requests this Court's reconsideration of its order partially granting and partially denying summary judgment because the court committed clear error on the following points: (1) Defendant reasonably relied on its appraisers' survey; (2) Defendant reasonably relied upon several other studies which differentiate between on-premises and off-site businesses; (3) Defendant reasonably relied upon public comments which constitute substantial evidence of the adverse effects caused by off-site businesses.

Additionally, Defendant presents the Court with newly-discovered evidence of adverse secondary effects caused by "take-home-only" sexually oriented businesses. Such evidence is filed herewith in the form of affidavits and exhibits that were unavailable at time of summary judgment.

II.

In the alternative, Defendant seeks clarification of certain findings and conclusions set forth in the order, including a finding as to the existence of a reasonable number of alternative sites for the relocation of Dreamer's. Defendant requests clarification from the court that it remains free to determine whether sufficient evidence exists that businesses like Dreamer's adversely affect surrounding properties, and if so, it remains free to implement its ordinances as to Dreamer's under those circumstances. Finally, Defendant requests clarification that it may enforce the "non-locational" restrictions of its ordinances against Dreamer's.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the Court reconsider and amend its March 29, 2005 Order and its March 30, 2005 Entry of Final Judgment.

Respectfully submitted,

/s/_____

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ATTORNEYS FOR
DEFENDANT,
CITY OF KENNEDALE

CERTIFICATE OF CONFERENCE

I, Wayne K. Olson, attorney with TAYLOR, OLSON, ADKINS, SRALLA & ELAM, LLP made a good faith attempt to confer by telephone with Louis Sirkin, Jennifer Kinsley, and Gary Polozola, attorneys for Plaintiff-intervenor, on April 11, 2005, regarding the merits of this Motion. Mr. Polozola was unavailable due to a medical emergency. Mr. Sirkin and Ms. Kinsley are out of town until April 14, which is past Defendant's deadline to file this motion, and their office indicated they were unavailable to confer. Even though

a conference was not possible, Defendant anticipates that Plaintiff-intervenor will oppose this motion.

/s/_____
WAYNE K. OLSON

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4:02-CV-458-Y
(Consolidated with 4:02-CV-471-Y)

[Filed April 11, 2005]

HAND A LAND CORPORATION	)
d/b/a/ SHOWTIME CABARET, et al.	)
	)
vs.	)
	)
CITY OF KENNEDALE, TEXAS	)
	)

FINAL JUDGMENT

Pursuant to plaintiff Beverly Van Dusen's agreed Motion to Dismiss with Prejudice, filed April 7, 2005, and granted this same day, and to Federal Rules of Civil Procedure 58 and 41(a) (1),

It is hereby ORDERED, ADJUDGED, and DECREED that all claims in the above-styled and numbered cause are DISMISSED WITH PREJUDICE. All costs under 28 U.S.C. § 1920 shall be taxed against the party incurring the same.

SIGNED April 11, 2005.

/s/
TERRY R. MEANS
UNITED STATES DISTRICT
JUDGE

TRM/kat

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4:02-CV-458-Y
(Consolidated with 4:02-CV-471-Y)

[Filed March 29, 2005]

H AND A LAND CORPORATION	)
d/b/a/ SHOWTIME CABARET, et al.	)
	)
v.	)
	)
CITY OF KENNEDALE, TEXAS	)
	)

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING PLAINTIFF-INTERVENOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
(with special instructions to the clerk of court)

Pending before the Court is defendant City of Kennedale, Texas ("Kennedale")'s Motion for Summary Judgment [doc. # 94-1]. Also pending before the Court is the Motion for Partial Summary Judgment [doc. # 115-1] of plaintiff-intervenor Reliable Consultants, Inc., d/b/a/ "Dreamer's"

(hereinafter, "Reliable"). Having carefully considered the motions, responses, and replies, the Court concludes that both motions should be PARTIALLY GRANTED and PARTIALLY DENIED.

I. RELEVANT BACKGROUND

Reliable and plaintiff Beverly van Dusen, d/b/a B & V Video Enterprises d/b/a "New Video" (hereinafter, "B & V") operate sexually oriented businesses on property in Tarrant County, Texas, Kennedale annexed in 1999. Kennedale's ordinances at the time of annexation, as well as those enacted afterward (collectively, "the ordinances"), prohibited Dreamer's, New Video, and three other sexually oriented businesses from operating in their current locations. The ordinances do not ban sexually oriented businesses altogether, but provide that such businesses may not operate within 800 feet of a residential district, a church or synagogue, a school or licensed day-care center, a public library, another sexually oriented business, or within specified overlay districts. The ordinances also require any sexually oriented businesses to obtain a license to operate. The affected businesses were given a three-year amortization period from the date of annexation in which to recoup their investments and relocate their businesses. An appeal for an extension of time was also possible, though neither Reliable nor B & V applied for such an extension.

On May 20, 2002, H and A Land Corporation, d/b/a/ Showtime Cabaret ("H and A"), one of the sexually oriented businesses impacted by the annexation, brought suit in this Court against Kennedale seeking a temporary restraining order and preliminary injunction against Kennedale's enforcement of the ordinances. On May 23, Dingler & Dingler Construction Company, d/b/a Fantasy Foxx

("Dingler"), intervened as a plaintiff in the action; Reliable intervened as a plaintiff on May 24. B & V, collectively with Southern Salvage Inc., d/b/a Log Cabin Adult Bookstore ("Southern Salvage"), brought a separate suit against Kennedale on May 24 that was later consolidated with H and A's suit on June 11. Kennedale later settled its disputes with H and A, Dingler, and Southern Salvage, and their claims against Kennedale were dismissed with prejudice by the Court.[1] While Dingler and Southern Salvage ceased operation of their businesses, H and A was permitted to continue its operation following an agreement to make aesthetic changes to its facility and to add a pizza restaurant within the building.

Reliable's complaint requests a declaratory judgment that Kennedale's ordinances are unconstitutional on their face because they impose a prior restraint on the exercise of the right to free expression, impose improper time, place, and manner restrictions, constitute a taking of private property, and are content-based restrictions on speech. Reliable also seeks a permanent injunction, just compensation for the taking of its private property, and attorneys' fees. B & V's complaint alleges that Kennedale's ordinances are unconstitutional on their face and void for vagueness and overbreadth, constitute violations of freedom of expression because they are prior restraints, are content-based, limit alternative avenues of communication, and violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. B & V requests preliminary and permanent injunctions, a declaration that Kennedale's ordinances are unconstitutional pursuant to

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[1] H and A's claims were dismissed on December 4, 2002. Southern Salvage's claims were dismissed with prejudice on January 13, 2004, while Dingler's claims were dismissed with prejudice on January 14.

the First, Fifth, Eighth, Ninth, and Fourteenth Amendments to the Constitution, and attorney's fees.

Kennedale filed a motion for summary judgment as to both Reliable and B & V (collectively, "Plaintiffs")'s claims. Reliable moved for partial summary judgment as to its request for a declaration regarding its prior-restraint claims, its claim that the ordinances constitute improper time, place, and manner restrictions, and its claim that the ordinances constitute content-based restrictions on speech. B & V has not moved for summary judgment on any of its claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when the record establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is considered "genuine" if "it is real and substantial as opposed to merely formal, pretended, or a sham." *Bazan v. Hidalgo Cty.*, 246 F.3d 481, 489 (5th Cir. 2001) (citing *Wilkinson v. Powell*, 149 F.2d 335, 337 (5th Cir. 1945)). Facts are considered "material" if they "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). To determine whether there are any genuine issues of material fact, the Court must first consult the applicable substantive law to ascertain what factual issues are material. *Lavespere v. Niagra Mach. & Tool Works*, 910 F.2d 167, 178 (5th Cir. 1990). Next, the Court must review the evidence on those issues, viewing the facts in the light most favorable to the nonmoving party. *Id.*; *Newell v. Oxford Mgmt. Inc.*, 912 F.2d 793, 795 (5th Cir. 1990); *Medlin v. Palmer*, 874 F.2d 1085, 1089 (5th Cir. 1989).

In making its determination on the motion, the Court must look at the full record including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. See FED. R. CIV. P. 56(c); *Williams v. Adams*, 836 F.2d 958, 961 (5th Cir. 1988). Rule 56, however, "does not impose on the district court a duty to sift through the record in search of evidence to support" a party's motion for, or opposition to, summary judgment. *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir. 1992). Thus, parties should "identify specific evidence in the record, and . . . articulate" precisely how that evidence supports their claims. *Forsyth v. Barr*, 19 F.3d 1527, 1536 (5th Cir. 1994). Further, the Court's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.

To prevail on a motion for summary judgment, the moving party has the initial burden of demonstrating that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *See Celotex Corp v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A defendant moving for summary judgment may submit evidence that negates a material element of the plaintiff's claim or show that there is no evidence to support an essential element of the plaintiff's claim. *See Celotex Corp.*, 477 U.S. at 322-24; *Crescent Towing and Salvage Co. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994); *Lavespere*, 910 F.2d at 178.

To negate a material element of the plaintiff's claim, the defendant must negate an element that would affect the outcome of the action. *See Anderson*, 477 U.S. at 247. If the defendant moves for summary judgment alleging no evidence to support an essential element of the plaintiff's claim, the defendant need not produce evidence showing the absence of

a genuine issue of fact on that essential element. Rather, the defendant need only show that the plaintiff, who bears the burden of proof, has adduced no evidence to support an essential element of his case. *See Celotex*, 477 U.S. at 325; *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 379 (5th Cir. 1988).

When the moving party has carried its summary-judgment burden, the respondent must go beyond the pleadings and by his own evidence set forth specific facts showing there is a genuine issue for trial. *Arbaugh v. Y&H Corp.*, 380 F.3d 219, 222 (5th Cir. 2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)); *see also* FED. R. CIV. P. 56 (e). This burden is not satisfied by creating some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *See Anderson*, 477 U.S. at 249-50.

III. ANALYSIS

The First Amendment protects sexually explicit speech, whether film, video, print, or symbolic, that is not obscene. *TK's Video v. Denton County*, 24 F.3d 705, 707 (5th Cir. 1994) (citing *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 130 (3rd Cir. 1993)). Society's interest in protecting such speech, however, "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (plurality opinion). Given this distinction, restrictions on sexually oriented businesses are permissible under certain circumstances. *City of Renton v. Playtime*

Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986).

A. Prior Restraint

Reliable argues that the ordinances are so restrictive in providing reasonable alternative sites for relocation that they impose a prior restraint on its First Amendment rights. Where an ordinance imposes a total ban on sexually oriented businesses it may constitute a prior restraint. *See Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 290-91 (5th Cir. 2003). Reliable bases its argument on the fact that two of the sexually oriented businesses impacted by the ordinances have ceased operation.

This fact, alone, cannot support Reliable's prior-restraint argument. The ordinances clearly do not ban sexually oriented businesses altogether, but instead provide that such businesses may not operate within certain designated areas and within certain range of residential districts, churches or synagogues, schools or licensed day-care centers, public libraries, or other sexually oriented businesses. Furthermore, the fact that H and A was allowed to continue its operation within Kennedale demonstrates that there is not a total ban on the operation of adult-entertainment businesses within the city. The Court therefore concludes that Kennedale is entitled to summary judgment on Reliable's prior-restraint claim.[2]

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[2] The Court notes that B & V's complaint contains several prior-restraint allegations, none of which were addressed by Kennedale in its motion for summary judgment. Consequently, because Kennedale wholly fails to address the allegations in B & V's complaint, the Court grants Kennedale's summary-judgment motion only as to Reliable's prior-restraint claims and not as to B & V's.

B. Content-Based versus Content-Neutral Time, Place, and Manner Restrictions

Kennedale contends that the ordinances should be analyzed as time, place, and manner regulations. "Zoning regulations restricting the location of adult entertainment businesses are considered time, place, and manner regulations . . . if they do not ban [adult-entertainment] businesses throughout the whole of a jurisdiction and are 'designed to combat the undesirable secondary effects of such businesses' rather than to restrict the content of their speech per se." *Encore Videos*, 330 F.3d at 291(quoting *Renton*, 475 U.S. at 49) (citing *Lakeland Lounge v. Jackson*, 973 F.2d 1255, 1257-58 (5th Cir. 1992)). Harmful "secondary effects" of sexually oriented businesses include crime, reduction of economic activity, and lowered property values. *Id.* The Court has already determined that the present ordinances do not ban sexually oriented businesses throughout all of Kennedale, and will therefore focus its inquiry on whether the ordinances are aimed at combating secondary effects.

"Where 'nothing in the record . . . suggests impermissible motives on the part' of the enacting legislature, a local government seeking to use the secondary-effects justification need show only that '(1) the drafters of the ordinance did rely upon studies of secondary effects,' and (2) a 'majority' of the city council members received 'some information about the secondary effects.' *Id.* (quoting *Lakeland Lounge*, 973 F.2d at 1259). The record here reflects that this standard has been satisfied. Nothing in the record suggests an impermissible motive, and the ordinances themselves indicate that Kennedale reviewed other cities' studies, as well as its own survey, of secondary effects in enacting the ordinances. (Def.'s App. in Support of Mot. for Summ. J. at 1-2a, 31, 48, 91, 97 (Ordinances)). The studies that were reviewed and the

information received regarding those studies was also provided to city-council members. (Def.'s App. to Reply to Pl.'s Resp. to Def.'s Mot. for Summ. J. at 449-50 (Olson Aff.)). The Court will therefore analyze the ordinances as time, place, and manner restrictions.

Time, place, and manner restrictions on speech violate the First Amendment unless they are content-neutral, are designed to serve a substantial governmental interest, do not unreasonably limit alternative avenues of communication, and are narrowly tailored. *See Encore Videos*, 330 F.3d at 291-92.[3]

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[3] The Court notes Kennedale's advancement of the standard articulated in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). But *O'Brien* typically applies to adult-entertainment cases where regulations are imposed on the *manner* in which speech can occur, such as restrictions on public nudity, rather than to regulations on the *location* where such expression can take place, such as the zoning ordinance at issue here. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S. Ct. 1382, 20 L. Ed. 2d 672 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456, 20 L. Ed. 2d 672 (1991); *J & B Entertainment v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998). Cases involving circumstances similar to the present dispute apply the *Renton* standard articulated in *Encore Videos*. *See City of L.A. v. Alameda Books*, 535 U.S. 425, 122 S. Ct. 1728, 20 L. Ed. 2d 672 (2002); *Renton*, 475 U.S. at 41; *Encore Videos*, 330 F.3d at 288; *N.W. Enters. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003); *Lakeland Lounge*, 973 F.2d at 1255; *SDJ, Inc. v. Houston*, 837 F.2d 1268 (5th Cir. 1988). The Court will therefore apply the *Renton* standard articulated in *Encore Videos* rather than the *O'Brien* standard.

(1) Content-Neutrality

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, and manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Hill v. Colorado*, 530 U.S. 703, 719, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)). This inquiry "requires courts to verify that the 'predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of [such speech].'" *Almeda Books*, 535 U.S. at 440-41 (quoting *Renton*, 475 U.S. at 47). In essence, the Court must ask whether the ordinances aim to regulate the content or the consequences of sexually explicit speech.[4] *TK's Video*, 24 F.3d 705 at 707. Proof of the efficacy of the ordinance is not required.[5] *N.W. Enters.*, 352 F.3d at 174. Should the Court determine that a regulation is content based, it is presumptively invalid and subject to strict scrutiny. *Alameda Books*, 535 U.S. at 434 (citing *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118, 112 S. Ct. 501, 116 L. Ed. 2d 476

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[4] This inquiry "is similar to that applied to the question of secondary effects motivation." *Encore Videos*, 330 F.3d at 292. A court must look to whether the challenged ordinances "address[] [the] secondary effects of adult speech, as demonstrated by the legislative record." *N.W. Enters.*, 352 F.3d at 174.

[5] Such evidence should only be examined at the second stage of the court's inquiry, i.e., when analyzing whether the ordinances are designed to serve a substantial governmental interest. *Almeda Books*, 535 U.S. at 440-41 (citing *Renton*, 475 U.S. at 50-52).

(1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230-231, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987)).

The ordinances at issue here either specifically state, or amend and adopt the findings of prior ordinances that state,[6] that the Kennedale city council seeks to minimize and control the adverse secondary effects of sexually oriented businesses.[7]

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[6] Ordinance No. 108 imposes licensing and locational requirements on sexually oriented businesses; its preamble states Kennedale's findings regarding such businesses and its reasons for imposing zoning restrictions on them. (App. to Def.'s Mot. for Summ. J. at 2-3). Ordinance No. 186 adopts the findings in Ordinance No. 108 and amends the regulations contained therein. (*Id.* at 30-46). Ordinance No. 187 amends the zoning restrictions for the overlay districts established in the Kennedale zoning ordinance and given treatment in Ordinance No. 186, which amended Ordinance No. 108. (*Id.* at 34, 48-50). Ordinance No. 226 amends Ordinance Nos. 186 and 187, which amended Ordinance No. 108. (*Id.* at 79). Ordinance No. 231 amends the regulations in Ordinance No. 187. (*Id.* at 86). Ordinance Nos. 252 and 269 adopt the findings made in Ordinance Nos. 108 and 186 and also finds, based upon the results of a survey conducted by the city attorney's office, that take-home only establishments have adverse effects on surrounding property values. (*Id.* at 91-92). Because all of these ordinances either relate back or specifically amend Ordinance No. 108, the Court will treat the findings, statements, and conclusions reached in Ordinance No. 108's preamble as applying to all of the ordinances. Only Ordinance No. 210, which merely re-classifies, zones, or re-zones all of the property within Kennedale, does not specifically relate back to Ordinance No. 108. (*Id.* at 72-77).

[7] The preamble to Ordinance No. 108 states, in relevant part:

WHEREAS, the City Council of the City of Kennedale, Texas, heretofore adopted regulations restricting the location of sexually oriented businesses within the City of Kennedale based upon

studies, reports, and findings regarding the harmful effects of sexually oriented businesses on surrounding land uses; and

WHEREAS the city council deems it necessary and advisable to amend these regulations . . . ; and

WHEREAS, studies, reports, and findings conducted by the cities of Austin, El Paso, and Indianapolis regarding the harmful effects of sexually oriented businesses on surrounding land uses have been presented to and reviewed by the city council; and

WHEREAS, studies, reports, and findings conducted by the cities of Los Angeles, Las Vegas, Houston, Amarillo, and Beaumont were presented to the city council and made part of the public record; and

WHEREAS, the city finds that churches, synagogues, licensed day care centers, public parks, schools and public libraries are centers of family oriented activities and therefore enhance the quality of life in surrounding areas; and

WHEREAS, there is convincing documented evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on surrounding land uses, causing increased crime and the downgrading of property values; and

WHEREAS, the city council desires to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime, preserve the quality of life; preserve the property values and the character of surrounding neighborhoods; and deter the spread of urban blight; and . . .

WHEREAS, the city council finds that sexually oriented businesses are frequently used for activities such as prostitution or sexual liaisons of a casual nature; and

(Def.'s App. to Mot. for Summ. J. at 2-3, 31-32, 48, 79, 91-92, 97-98 (Ordinances)). Although merely mentioning "secondary effects," or its functional equivalent, within an ordinance's preamble "may not save a statute 'formulated without specific attention to specific secondary effects,'" *see J & B Entertainment*, 152 F.3d at 374 (quoting *Lakeland Lounge*, 973 F.2d at 1259), the ordinances here include the requisite degree of specificity. The ordinances demonstrate that Kennedale not only made specific findings of the adverse effects generally associated with sexually oriented businesses, but also that Kennedale sought to remedy specific adverse effects, namely, increased crime, decreased property values, sexual-crime activity, and the spread of sexually transmitted diseases. *See supra* note 7; *J & B Entertainment*, 152 F.3d at 374 ("No explanation of what specific secondary effects motivated [the city] to enact the Ordinance appears in its text, and the City Council failed to make any specific legislative

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WHEREAS, the concern over sexually transmitted diseases is a legitimate health concern of the city which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens; and

WHEREAS, the city council finds that these amendments will promote the public health, safety, morals and general welfare of the citizens of the city; and

WHEREAS, the city council finds that these amendments have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials, nor do these amendments have the effect of restricting or denying access by adults to sexually oriented materials protected by the First Amendment . . .

(App. to Def.'s Mot. for Summ. J. at 2-3).

findings prior to enactment"). The record also reflects that, in enacting the ordinances, Kennedale relied upon studies conducted for other cities, statements made at public hearings, a survey conducted by Kennedale's attorney, and other information compiled by Kennedale's attorney that was presented to the Kennedale city council. (*Id.* at 2-3, 31-32, 91-92, 97-98; App. to Def.'s Reply to Pl.'s Resp. to Def.'s Mot. for Summ. J. at 386-96 (Hearing Minutes), 449-53 (Olson Aff.), 454-56 (Miller's 2nd Aff.)). Furthermore, Ordinance No. 108 specifically states that the ordinance is directed not at limiting protected speech but rather at controlling the adverse effects associated with such expression. (*Id.* at 2-4).

The record therefore demonstrates that the ordinances are predominantly concerned with and seek to address the secondary effects from, rather than the content of, the form of speech regulated. Moreover, it is important to note that the ordinances do not directly regulate speech, but rather regulate the locations where such speech may occur. *See Hill*, 530 U.S. at 719. As such, the Court concludes that the ordinances were not adopted because of disagreement with the message conveyed and therefore constitute content-neutral regulations. *See SDJ*, 837 F.2d at 1268; *Lakeland Lounge*, 973 F.2d at 1258-59. Summary judgment on this question is therefore awarded to Kennedale.[8]

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[8] Resolution of this issue in Kennedale's favor, in effect, denies Reliable's motion for summary judgment as to the seventh "count" in its complaint and grants summary judgment on the issue to Kennedale.

(2) Substantial Governmental Interest Plus Narrow Tailoring[9]

Kennedale must be able to demonstrate a connection between the speech regulated and its substantial interest in the ordinances' enactment. *Almeda Books*, 535 U.S. at 438. Courts have routinely held that "[a] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect,'" *Renton*, 475 U.S. at 50, 52 (quoting *Young*, 427 U.S. at 71), and that courts must "allow cities a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Almeda Books*, 535 U.S. at 439-41 (quoting *Renton*, 475 U.S. at 52 (quoting *Young*, 427 U.S. at 71)). Attempting to control the secondary effects of adult-entertainment businesses by restricting the businesses themselves is one such permissible solution. *Lakeland Lounge*, 973 F.2d at 1257; *see also Encore Videos*, 330 F.3d at 293. The diminution of secondary effects that Kennedale's ordinances seek to achieve may therefore be important enough to be said to further a substantial government interest. *See Encore Videos*, 330 F.3d at 293.

In determining whether a city has a substantial interest in its regulation, however, a court cannot "hypothesize . . . an objective or accept a [city's] naked assertion" of importance, but instead must "intrude into the regulatory decision process

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[9] Although these are separate factors in the analysis, *Encore Videos* recognized that, were an ordinance to fail the more stringent requirements of the narrow-tailoring prong, then the ordinance's underlying premise would almost surely also fail to qualify as a substantial governmental interest. *Encore Videos*, 330 F.3d at 293. For this reason, and also because the particular facts of this case make it practical to do so, the Court will analyze these factors in tandem.

to the extent that [it] insist[s] upon objective evidence of purpose—a study or findings." *SDJ*, 837 F.2d at 1274. This insistence upon some form of objective proof "reduces the risk that a purported effort to regulate effect is a mask for regulation of content[—t]hat is, evidence of legitimate purpose is supported by proof that secondary effects actually exist and are the result of the business subject to the regulation." *Id.* A city may rely on "any evidence that is 'reasonably believed to be relevant,'" but may not use "shoddy data or reasoning" in doing so. *Almeda Books*, 535 U.S. at 438 (quoting *Renton*, 475 U.S. at 51-52). Furthermore,

> [t]he municipality's evidence must fairly support the municipality's rationale for its ordinance. If [the] plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If [the] plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 [] 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (plurality opinion).

Almeda Books at 438-39.

Kennedale has relied on several studies demonstrating that adult-entertainment businesses have adverse secondary effects on their surrounding communities. All of these studies were conducted in other cities: a 1986 study conducted in Austin; one from El Paso conducted in 1986; Los Angeles's 1976

study; a 1978 Las Vegas study; an Amarillo study conducted in 1977; Beaumont's 1982 study; a 1980's study conducted in Houston; a 1984 study from Indianapolis; and a 1986 Oklahoma City study (collectively, "the predicate studies"). (App. to Def.'s Reply to Pl.'s Resp. to Def.'s Mot. for Summ. J. at 109-385; App. to Pl.'s Mot. in Limine at 91-194). Kennedale is "entitled to rely on the experiences . . . of other cities . . . so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52; *see also Alameda Books*, 535 U.S. at 438; *Encore Videos*, 330 F.3d at 294. The predicate studies all conclude that adult-entertainment businesses have adverse secondary effects on their surrounding communities, including adverse effects upon crime levels and property values.

Kennedale also relies upon an informal survey of real-estate appraisers prepared by April Virnig, Kennedale's legal counsel. Three hundred eighteen surveys were sent out to licensed real-estate appraisers in Tarrant County who were listed on a website; only thirty-six of the surveys sent out were returned, which constitutes an 11.3 percent return rate.

Though others assisted her in its formulation, Virnig prepared the main portion of the survey herself. Virnig is not a specialist in social science, in the field of statistics, or in conducting surveys. (App. to Pl.'s Mot. in Limine at 15-50; App. to Pl.'s Mot. in Limine at 171). Furthermore, the survey was not drafted or administered in a scientific manner. Virnig and Kennedale's city staff merely committed to paper some questions regarding an adult-entertainment video store, mailed that list of questions to the appraisers listed on a website, and then waited for the appraisers to respond voluntarily and without incentive. (*Id.* at 15-50)

In administering and evaluating the survey, no effort was made to ensure representative sampling, no sample group of appraisers was retained to review the survey, no attention was given to the difference between or the comparative utility of open-ended and closed-ended questions, no control group was formed, no mechanisms were installed to protect against coverage error, and no measures were put in place to ensure that the person who responded to the survey was actually the person to whom the survey was sent. (*Id.*) In addition, although the responses to some of the questions strongly indicated that sexually oriented businesses have a deleterious effect upon residential-and commercial-property values, the overall responses to other questions were less supportive of Kennedale's position.[10] Thus, not only was the process in conducting the survey lacking in scientific rigor, but the results were also less than compelling for Kennedale due to the survey's low response rate, the answers to some of the questions posed, and the comments made at the end of the survey.

While the failure to conduct the survey without much, if any, scientific rigor may not be enough alone to lead the Court to determine that Kennedale could not reasonably rely upon the survey's results, that fact coupled with the weak return and the mixed results contained therein forces the Court to question Kennedale's reasonableness in relying on the survey. Kennedale cannot use "shoddy data or reasoning"

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[10] For instance, in response to the question "Would you expect the average value of COMMERCIAL property located within 500 feet of an adult video store to be affected by its proximity?," 23 answered yes and 10 answered no. In response to the question "Would you expect the average value of COMMERCIAL property located within 1000 feet of an adult video store to be affected by its proximity?," 19 responded yes and 14 responded no.

in justifying its ordinances. *Almeda Books*, 535 U.S. at 438 (quoting *Renton*, 475 U.S. at 51-52). But the weaknesses in the survey's formulation and administration, the low response rate, and the sometimes tepid support it offers to Kennedale's position, make it appear that Kennedale has done so.

Even assuming, however, that Kennedale were able to demonstrate that it has a substantial interest in regulating businesses such as Dreamer's and New Video, Kennedale is unable to show that the ordinances have been narrowly tailored. To be narrowly tailored, an ordinance must regulate only speech that actually serves the government's substantial interest in its being regulated. As recently articulated by the Fifth Circuit,

> [a] time, place, and manner regulation meets the narrow tailoring standard if it "targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby [v. Schultz*, 487 U.S. 474, 485, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988)]. Although [the] government need not choose the "least intrusive means" to advance its legitimate interests, it "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799.

Encore Videos, 330 F.3d at 293. The ordinances here fail this narrow-tailoring standard because they regulate expression that is not included within their justification for the regulation.

The ordinances generally impose restrictions upon "sexually oriented businesses," which is defined as

> an adult arcade, adult bookstore, adult cabaret, adult motel, adult movie theater, adult video store, love

> parlor, nude modeling studio or other commercial enterprise, the primary business of which is the offering of a service or the selling, renting or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to its customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, or whose employees or customers appear in a state of nudity.

(App. to Def.'s Mot. for Summ. J. at 8). The ordinances therefore apply equally to those establishments offering on-site entertainment, where individuals can view sexually explicit materials or activity at the establishment itself, and those offering only materials for off-site consumption, where patrons may only purchase sexually explicit materials for off-premises use.

Reliable's bookstore, Dreamer's, sells sexually explicit but non-obscene video cassette tapes, DVD recordings, magazines, other print material, novelties, clothing, and other general merchandise. Dreamer's does not offer any on-site entertainment of any kind—it is a take-home-only business, which means that none of the materials sold there may be viewed or consumed on premises. The store offers no live entertainment, viewing booths, or theaters.

Since Kennedale justifies the ordinances on its desire to combat the adverse secondary effects of "sexually oriented businesses," Kennedale must be able to demonstrate that the ordinances address those problems. *Encore Videos*, 330 F.3d at 294. To establish that the ordinances satisfy this narrow-tailoring standard, Kennedale relies on the predicate studies it reviewed, the survey conducted by Virnig, and statements

made at public hearings. This evidence, however, does not sufficiently support Kennedale's broad regulation of sexually oriented businesses. None of the predicate studies differentiate between on-site and off-site adult-entertainment businesses in either the collection of data or in the studies' resulting opinions. All of the studies simply lump all forms of sexually oriented businesses into one category when analyzing their impact upon surrounding communities.

Such a general treatment of adult-entertainment businesses is not sanctioned within the Fifth Circuit:

> Off-site businesses differ from on-site ones, because it is only reasonable to assume that the former are less likely to create harmful secondary effects. If consumers of pornography cannot view the materials at the sexually oriented establishment, they are less likely to linger in the area and engage in public alcohol consumption and other undesirable activities." *See World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 816 P.2d 18, 21 (Wash. 1991) . . . *But see Z.J. Gifts, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998) . . .; *ILQ Invs., Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994).

Id. at 295. Where an ordinance is as extensive as the ordinances at issue here, the Court "must require at least some *substantial evidence* of the secondary effects of establishments that sell adult products solely for off-site consumption." *Id.* (citing *Alameda Books*, 525 U.S. at 438) (emphasis added). Thus, "in order to meet the narrow tailoring requirement, [Kennedale must] . . . provide at least some *substantial evidence* of secondary effects specific to adult businesses that sell books or videos solely for off-site entertainment." *Id.* (emphasis added) (citing *Ward*, 491 U.S.

at 799 (holding that the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals")).

Neither the predicate studies nor the public comments submitted as evidence satisfy this requirement. As already discussed, none of the predicate studies differentiate between sexually oriented businesses that offer on-site and off-site materials. There are surveys attached to the Indianapolis and Oklahoma City studies focusing on a "bookstore"; but neither of these surveys give a definition for "bookstore" or in any way indicate that "bookstore" refers only to those establishments selling off-site materials. (App. to Pl.'s Mot. in Limine at 170-78, 189-191). "Bookstore" can be and has been interpreted to include many forms of on-site entertainment, and the term, alone, does not connote solely businesses that offer printed materials for exclusive off-site consumption. *See United States v. Jenkins*, 46 F.3d 447, 449 (5th Cir. 1995) (involving 17 adult bookstores that provided on-site peep machines exhibiting pornographic videotapes); *Almeda Books*, 535 U.S. at 429, 432 (involving bookstore where patrons could view videotapes on-site for a fee).

Furthermore, while Kennedale may rely on the experiences of other cities in enacting regulations, that evidence must "be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52. The predicate studies are not relevant to the problem addressed by Kennedale because Kennedale seeks to restrict all sexually oriented businesses, both on-and off-site, by relying on evidence that fails to take the substantial differences between those types of establishments into account.

Kennedale's reliance on the comments made at public hearings suffers from the same lack of specificity that their

reliance on the predicate studies does. Although some of the comments made at the public hearings indicate that Kennedale's citizens were concerned with adverse secondary effects from the adult-entertainment businesses in operation at that time, none of those comments indicate whether they refer to on-site- or off-site-entertainment establishments exclusively, or even collectively. (App. to Def.'s Reply to Pl.'s Resp. to Def.'s Mot. for Summ. J. at 386-396).

Consequently, because neither the predicate studies nor the public comments constitute evidence, let alone substantial evidence, of secondary effects specific to off-site adult businesses, the only evidence left for Kennedale to rely upon in regulating Dreamer's is the survey conducted by Virnig.

Even assuming that the casual manner with which the survey was conducted, combined with its low rate of return, would constitute "substantial evidence," the survey also fails to sufficiently distinguish between on- and off-site adult-entertainment establishments. The preamble of the survey sets out for its respondents certain definitions and factual assumptions, the relevant portion of which states:

> For purposes of this survey, an adult video store is defined as a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration photographs, films, motion pictures, video cassettes, video reproductions, slides or other visual representations which are distinguished or characterized by an emphasis on matters depicting or describing specified sexual activities or specified anatomical areas.
>
> Adult videos may be rented or purchased, but *may not* be viewed at the store.

(App. to Pl.'s Mot. in Limine at 84). While the definition of "adult video store" indicates that "photographs, films, motion pictures, video cassettes, video reproductions, slides or other visual representations . . ." are offered "for sale or rental for any form of consideration," only videos are specifically limited by the definition to off-site consumption, thereby wholly excluding from the off-site limitation all of the other types of materials that may be bought or rented. Thus, a respondent could easily assume that the definition would allow photographs, slides, films, motion pictures, and other visual representations to be viewed on-site. The results of a survey that does not precisely enquire as to the secondary effects of adult businesses that allow only off-site consumption of their inventory cannot constitute "substantial evidence" of the secondary effects of those businesses.

Owing primarily to the fundamental flaw in the survey's enquiry, but also because of the survey's shoddy methodology, the Court concludes that Kennedale has failed to provide the Court with substantial evidence upon which Kennedale could be said to have reasonably relied in regulating off-site sexually oriented businesses.[11] The

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[11] To establish that Kennedale has a substantial interest in regulating both on-and off-site sexually oriented businesses, there must be some "evidence of legitimate purpose . . . supported by proof that secondary effects actually exist and are the result of the business subject to the regulation." *SDJ*, 837 F.2d at 1274. Kennedale, however, has no evidence indicating that off-site only adult businesses result in the same adverse secondary effects that on-site adult businesses do. Reliable has therefore cast doubt on Kennedale's evidence demonstrating its "substantial interest" in the regulation, and the burden is on Kennedale to "supplement the record with evidence renewing support for a theory that justifies its

ordinances, therefore, are neither narrowly tailored nor supported by a substantial governmental interest as applied to such off-site businesses. The Court therefore concludes that the ordinances are unconstitutional as applied to Reliable, and that Reliable is entitled to summary judgment on this issue.[12]

(3) Reliable's Claim for a Permanent Injunction

Reliable seeks summary judgment on the third claim in its complaint, which requests a permanent injunction prohibiting Kennedale from enforcing the ordinances that are unconstitutional as applied to Reliable. The Court finds that such an injunction is warranted.

The standard for a permanent injunction is essentially the same as for a preliminary injunction. *See Icee Distribs. v. J&J Snack Foods Corp.*, 325 F.3d 586, 587 n.34 (5th Cir. 2003); *Dresser-Rand Co. v. Virtual Automation Inc.*, 361 F.3d 831, 847 (5th Cir. 2004) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)). To obtain a permanent injunction, a plaintiff must therefore show: (1) actual success on the merits; (2) an irreparable injury if the injunction is not granted; (3) injury to the plaintiff if the injunction is not granted outweighs the injury to the defendant if it is granted; and (4) the granting of the permanent injunction will not disserve the public interest. *See Harris County v. Carmax Auto Superstores Inc.*,

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ordinance." *Almeda Books*, 535 U.S. at 438-39. Kennedale has failed to do so.

[12] Because the ordinances must fail on narrowly tailored and substantial-interest grounds, the Court need not examine whether Kennedale's ordinances offered alternative avenues of communication.

177 F.3d 306, 312 (5th Cir. 1999) (quoting *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989)); *Doe v. KPMG, L.L.C.*, 325 F.Supp.2d 746, 751 (N.D. Tex. 2004); *Millennium Rests. Group, Inc. v. City of Dallas*, 191 F.Supp.2d 802, 809 (N.D. Tex. 2002).

As already discussed, Reliable has demonstrated actual success on the legal merits of its claim that the ordinances, as applied to Reliable, are unconstitutional. Furthermore, non-obscene sexually explicit speech, whether film, video, print, or symbolic is protected by the First Amendment. *TK's Video*, 24 F.3d at 707 (citing *Mitchell*, 10 F.3d at 130). "[W]hen a case involves infringement of First Amendment rights, there is a strong presumption that the plaintiff will be irreparably injured if an injunction is not issued." *Millennium*, 191 F.Supp.2d at 810 (granting preliminary injunction against city's ordinance restricting sexually-expressive speech). As stated by the Supreme Court: "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 at (1976). The Court therefore concludes that Reliable would suffer irreparable injury were an injunction not granted.

The harm to Reliable in closing Dreamer's also outweighs the harm to Kennedale in allowing Dreamer's to remain in operation. Although Kennedale argues that its ordinances are aimed at restricting the adverse secondary effects associated with sexually oriented businesses, Kennedale has only weak and methodologically impaired evidence to show that such adverse secondary effects are actually the product of off-site businesses such as Dreamer's. Kennedale's evidence on this point is anemic, and there is no indication that Kennedale will actually suffer harm by allowing Dreamer's to continue operating. Dreamer's has operated in its current location for

twenty-five years and currently has no sites to which it may relocate. The harm to Reliable in forcing it to close Dreamer's therefore outweighs any potential harm to Kennedale in allowing it to remain open. Furthermore, Kennedale remains free to amend its ordinances, and, in the meantime, has police power to control any secondary effects that may result from allowing Dreamer's to remain in operation. See *Millennium*, 191 F.Supp.2d at 810. Given these facts, the Court concludes that Reliable would suffer greater harm from the enforcement of the ordinances than Kennedale will in being enjoined against their enforcement.

Finally, since Kennedale remains free to enforce its criminal regulations and laws and those ordinances that remain in compliance with the First Amendment, and may use its police power in doing so, the Court also concludes that the pubic interest will not be disserved by granting the injunction. *See id.* Nor does the injunction prevent Kennedale from amending its ordinances to come within the requirements of the Constitution, if it can do so. Since the factors necessary for entering a permanent injunction have been satisfied, the Court concludes that such a remedy is warranted.

(4) Kennedale's Time, Place, and Manner Regulation as Applied to B & V

B & V did not move for summary judgment. Kennedale argues that *Renton* has been satisfied as to B & V because New Video offers on-site entertainment. Kennedale, however, offers no evidence to support this allegation, and only cites to B & V's complaint as support for its argument. B & V's complaint only states that New Video sells, rents, exhibits, and distributes books, magazines, newspapers, and videotapes to consenting adults only; there is no indication of whether New Video is an on-or off-site business.

The Court must review the facts in the light most favorable to the plaintiff when reviewing Kennedale's motion for summary judgment. *Lavespere*, 910 F.2d at 178. The Court therefore must deny Kennedale's motion as to B & V on this issue. As there is neither evidence as to whether Kennedale had a substantial interest in regulating the type of business B & V operates, because the Court does not know what type of business that is, nor substantial evidence of narrow tailoring, the Court cannot conclude that there is no genuine issue of fact regarding those issues. Consequently, Kennedale's motion on this question as to B & V must be denied.

However, since it appears that resolution of this issue will turn on whether B & V operates an on-site or off-site business (assuming, of course, that resolution of whether the ordinances provide sufficient alternative avenues of communication will not also be dispositive), the Court notes that it will entertain a motion for leave by either or both parties for a second summary judgment motion that properly addresses whether New Video is an on-site or off-site adult-entertainment business.[13] Either party may also include within any such second motion for summary judgment arguments regarding B & V's prior-restraint claims.

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[13] Any such motions for leave must be filed no later than **May 2, 2005**, and the underlying summary-judgment motion(s) must be fully self-contained, meaning they may not refer for their arguments or evidence to any other motions or appendices already submitted to the Court.

C. Fifth Amendment and the Takings Clause

Reliable argues that the ordinances have produced a regulatory taking of its property without just compensation both because the ordinance requires Reliable to relocate and because the amortization period begins enforcement of the ordinance prior to the expiration of Reliable's license to operate. The Takings Clause of the Fifth Amendment provides that private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. Where a regulation "denies all economically beneficial or productive use of land," it may constitute a regulatory taking pursuant to the Fifth Amendment. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (citation omitted). The ordinances here do not prevent all reasonable uses of Reliable's property, and therefore do not constitute a taking. *See SDJ, Inc. v. Houston*, 837 F.2d 1268, 1278 (5th Cir. 1988); *N.W. Enters.*, 352 F.3d at 186. Kennedale is entitled to summary judgment on these claims.

D. B & V's Remaining Claims

(1) Vagueness and Overbreadth

The first claim for relief in B & V's complaint asserts that several of the definitions included in the ordinances are void for vagueness and overbreadth.[14] Kennedale argues that the

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[14] While "the vagueness doctrine protects individuals from laws lacking sufficient clarity of purpose or precision in drafting," *J & B Entertainment*, 152 F.3d at 365 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975)), "'[o]verbroad legislation need not be vague, indeed it may be too clear; its constitutional infirmity is that it sweeps protected

ordinances are clear in their meaning and precise in their definitions.

B & V has never indicated why the challenged portions of the ordinances are void for vagueness and overbreadth, and wholly failed to address these issues in defending itself against Kennedale's motion for summary judgment. When the moving party has carried its summary-judgment burden, the respondent must go beyond the pleadings and by his own evidence set forth specific facts showing there is a genuine issue for trial. *Arbaugh*, 380 F.3d at 222 (citing *Celotex*, 477 U.S. at 324); *see also* FED. R. CIV. P. 56(e). Not only has B & V not adduced any evidence showing there is a genuine issue for trial, but it also wholly failed to respond to Kennedale's arguments. Consequently, the Kennedale's motion for summary judgment on this issue must be granted.

(2) Equal-Protection and Due-Process Claims

Kennedale moves for summary judgment on B & V's claims pursuant to the Equal Protection and Due Process Clauses of the Fourteenth Amendment. B & V wholly failed to respond to Kennedale's arguments on these issues. Consequently, the Court concludes that Kennedale should be granted summary judgment on these claims.

III. CONCLUSION

Therefore, it is ORDERED that Kennedale's Motion for Summary Judgment [doc. # 94-1] is PARTIALLY GRANTED and PARTIALLY DENIED. Kennedale is hereby

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activity within its proscription.'" *Id.* (citing *News Co. v. Casado*, 721 F.2d 1281, 1287 (10th Cir. 1983)).

awarded summary judgment on "counts" two, four, five, and seven of Reliable's complaint. Kennedale is further awarded summary judgment as to B & V's first, third, and fourth causes of action.

It is further ORDERED that Reliable's Motion for Partial Summary Judgment [doc. # 115-1] is PARTIALLY GRANTED and PARTIALLY DENIED. Reliable is hereby awarded summary judgment on count three of its complaint.[15]

It is further ORDERED that Kennedale is PERMANENTLY ENJOINED from enforcing against Reliable those portions of the ordinances found in the above-styled and -numbered cause to be unconstitutionally applied to Reliable.

It is further ORDERED that, inasmuch as the Court has now granted summary judgment on all claims asserted by Reliable, the Court finds no just reason for delaying the entry of final judgment as to these claims and hereby DIRECTS the clerk of the Court to enter the Rule 54(b) Final Judgment issued separately this same day.

SIGNED March 29, 2005.

/s/
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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[15] The Court notes that this order resolves all of the claims made in Reliable's complaint.

APPENDIX I

To: Kennedale City Council
From: April M. Virnig, Assistant City Attorney
Date: July 3, 2003
Re: Survey

The City of Kennedale recently conducted a survey of real estate appraisers to obtain their opinion on the secondary affects an adult bookstore would have on the surrounding community.

I. METHODOLOGY

On or about April 16, 2003, the City of Kennedale conducted a survey. Three hundred eighteen (318) survey questionnaires were mailed to all licensed real estate appraisers in Tarrant County, Texas listed on the State of Texas website. All real estate appraisers who received the survey are licensed by the State of Texas. A sample survey questionnaire is attached as Appendix A. Thirty-six (11.3%) of the questionnaires were completed and returned. The table below summarizes the objective part of the questionnaire. This includes question nos. 1-13 and 15.[1] Subjective comments are discussed in a separate section of this report. These were taken from responses to question number 16.

The survey of real estate appraisers in Tarrant County produced results that were consistent with the results of the

[1] Question No. 14 was for internal purposes only.

national survey of appraisers carried out by the City of Indianapolis, attached as Appendix B. The results were all consistent with the survey of Oklahoma City real estate appraisers conducted by the City of Oklahoma's Community Development Department, attached as Appendix C. In the Kennedale survey, the Oklahoma survey, and the national survey, respondents overwhelmingly indicated that an adult book (or video store, as in the Kennedale survey) would have a negative effect on residential and commercial property values in the hypothetical surrounding neighborhood.

There were two major differences between the Kennedale survey and the Oklahoma and national surveys. First, the Kennedale survey inquired about effects at distances ranging from 500 to 1000 feet, while the other two surveys used distances from one to three blocks. Second, the Kennedale survey uses an adult video store, as opposed to an adult bookstore and the Kennedale survey specifically defined "adult video store" as a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration photographs, films, motion pictures, video cassettes, video reproductions, slides or other visual representations which are distinguished or characterized by an emphasis on matters depicting or describing specified sexual activities or specified anatomical areas. The hypothetical used by Kennedale specifically states that adult videos may be rented or purchased, but may not be viewed at the store. The Oklahoma survey and the national survey simply use the term "adult bookstore" in their surveys and do not include a definition.

II. SUMMARY OF RESULTS

In summary, most of the appraisers who responded to the Kennedale survey felt that the presence of an adult video store

would have a negative impact on both residential and commercial property values in the surrounding area, although the negative impact dissipates slightly as the distance from the adult video store increases.

A. Objective Questions

Would you expect the average value of RESIDENTIAL property located with 500 feet of an adult video store to be affected by its proximity:

__36__ Yes __3__ No

__28__ Residential property values would be <u>below</u> values of similar property not located within 500 feet of an adult video store.

__1__ Residential property values would be <u>higher</u> than similar property not located within 500 feet of an adult bookstore.

Would you expect the average value of COMMERCIAL property located within 500 feet of an adult video store to be affected by its proximity?

__23__ Yes __10__ No

__12__ Commercial property values would be <u>below</u> values of similar property not located within 500 feet of an adult video store.

__5__ Commercial property values would be <u>higher</u> than similar property not located within 400 feet of an adult bookstore.

Would you expect the average value of RESIDENTIAL property located within 800 feet of an adult video store to be affected by its proximity?

__28__ Yes __6__ No

__23__ Residential property values would be <u>below</u> values of similar property not located within 800 feet of an adult video store.

__1__ Residential property values would be <u>higher</u> than similar property not located within 800 feet of an adult bookstore.

Would you expect the average value of COMMERCIAL property located within 800 feet of an adult video store to be affected by its proximity?

__22__ Yes __10__ No

__17__ Commercial property values would be <u>below</u> values of similar property not located within 800 feet of an adult video store.

__0__ Commercial property values would be <u>higher</u> than similar property not located within 800 feet of an adult bookstore.

Would yo expect the average value of RESIDENTIAL property located within 1000 feet of an adult video store to be affected by its proximity?

__28__ Yes __6__ No

__23__ Residential property values would be <u>below</u> values of similar property not located within 1000 feet of an adult video store.

__1__ Residential property values would be <u>higher</u> than similar property located within 1000 feet of an adult bookstore.

Would you expect the average value of COMMERCIAL property located within 1000 feet of an adult video store to be affected by its proximity?

__19__ Yes __14__ No

__14__ Commercial property values would be <u>below</u> values of similar property not located within 1000 feet of an adult video store.

__0__ Commercial property values would be <u>higher</u> than similar property not located within 1000 feet of an adult bookstore.

Would you expect the presence of an adult video store to adversely affect attracting new COMMERCIAL businesses to this neighborhood?

__28__ Yes __6__ No

Generally, what is your opinion as to the effect of sexually oriented businesses on the surrounding properties?

__30__ Cause a decrease in the market value and marketability of surrounding properties

5 Have no effect on the market value and marketability of surrounding properties

1 Cause an increase in the market value and marketability of surrounding properties

B. Subjective Question

The final survey question allowed the participants to write a response in their own words.

16. Specifically, how do you think an adult video store affects the value of surrounding property located in Tarrant County, Texas?

Survey Answers no. 16, above (and additional hand-written comments) include the following:

Adversely affects residential properties more so than commercial properties...The types of commercial establishments that would be affected are the family oriented businesses such as grocery stores, malls, restaurants, etc.

Only with a paired sale would this be known. A paired sale is one without an adult store then a resale of same after which shows the difference.

It may affect more of the marketability and time on the market more than sales price. Residential property will be more adversely affected compared to commercial. Some uses like

day care, churches, offices, would not go for a site in close proximity.

I am aware of a property that was located adjacent to a S.O.B. that sold for 25% less than its market value (had it not been next to an S.O.B.); $800,000 values vs. $600,000 sale price. Some uses, such as industrial, do not appear to be as adversely affected as other uses, such as an office building or retail sales.

Negative. You have a family community.

A single store of sporadically placed stores have little effect, in my opinion. However, based upon what happened to the area in Dallas, N/W of Love Field, it does affect the overall value of the desirability for residential properties in the area, in my opinion.

The answers to the survey questions imply uniform impact on all properties - either residential or commercial. I have found that impact on commercial properties depends greatly on the type of commercial property, as some are clearly not impacted at all while others are severely impacted. The type of adult entertainment facility also has a great deal to do with any impact on nearby properties. I have found the size, location, and "presence" of the adult facility are key factors related to any impact.

Adult video stores create an extreme stigma for communities allowing these businesses to be located within their

boundaries. The first thing you see when entering Kennedale off 820 is "adult video" and "liquor stores." Families and businesses that support the community do not want the stigma that is attached to sexually oriented businesses and liquor stores. Salvage yards are negative influence upon residential and retail. If the City of Kennedale ever wants to be a nice suburb or bedroom community, it will have to do some serious zoning work or taxation that will cause these types of businesses to leave.

No Affect.

Any residential or commercial property not similarly inclined will be negatively affected. Visually, these businesses have a much larger impact than physical location. As an appraiser, I cannot "quote" values without data, research and completing an appraisal analysis or report.

Naturally any adult business in a residential area is going to have an adverse affect on marketability and value of the residential properties.

It appears to limit number of potential users such as family oriented businesses. The adversely affects market value and marketability.

No need to single out video stores. Residential values can also be affected by proximity to fire stations, churches, cemeteries, water towers, power lines, schools, and/or shopping centers. An adverse value case is weak.

I would expect residential property values to be negatively affect by adult video store. Sexually oriented businesses are typically found in areas that do not exhibit a pride in ownership - Also these properties tend to command lower prices - In general, sexually oriented businesses are not seen as enhancers of value - More often than not, their presence is an indication of decline.

Discourages major chains, retailers, restaurants. Has greatest effect on residential values. Most "adult" uses are located within industrial area which are less negatively affected. Note: Arlington, Fort Worth and Tarrant County have all completed studies on the influence of sexually oriented businesses.

The questions you are asking cannot be answered simply. They are unique to the location and cannot be answered in general terms. My suggestion is that you actually hire a commercially qualified appraiser to do analysis and feasibility report to answer these items.

By allowing sexually explicit business of any type into your residential and neighborhood commercial areas (grocery stores, gas stations, doctor offices, vets, etc.) you impact the surrounding properties negatively. (Amount would take research to determine.) These types of businesses should go in areas of heavy commercial or light industrial uses (limited visibility, low traffic flow, etc.). People looking for such material will find it - many would prefer to be off the "beaten" path. Hence, not only would it help neighborhoods

and overall city appeal, it would probably be good for the business owners as well.

The market impact for the typical buyer would be negatively affected by proximity to adult sexually oriented businesses because the typical buyer would not be willing to pay the same price if given a choice between similar properties with the "SOB" near one versus the other, whether residential or commercial.

Decreases Value!

Has a definite market effect – the entire area tends to become non-family friendly. A negative market is created for family oriented business to go elsewhere. The make-up of the neighborhood changes. You will tend to have more crime. Focus and attention will have to change with the changes. I think you have disaster areas with such businesses. If the cities home-owners want it – ok, it's their home values.

Very negatively. Promotes crime, including drugs and promiscuity.

It would depend on the nature of the business. If it is in the area you are annexing on 287 it would definitely affect residential and commercial property values.

Every situation is different. It may or may not have any affect on property values.

Depends on the surrounding use - generally I have found that it does not affect industrial or heavy commercial type uses. Retail and residential uses are negatively affected because of public perception of sexually oriented businesses.

Red light districts should be zoned similarly to industrial parks. Therefore, only people with an interest travel to the area.

Appendix A

To: Tarrant County Professional Real Estate Appraisers
From: City of Kennedale, Texas
Date: April 16, 2003
RE: Survey

In the very near future, the City of Kennedale will be amending its ordinance regulating the location of sexually oriented businesses. In an effort to more completely analyze the impact of such businesses on surrounding properties, the City asks for your help in establishing a "best professional opinion" on the matter.

We ask that you please help us by completing the enclosed brief survey. As a professional real estate appraiser, the information you provide will help the City establish important information regarding locating adult sexually oriented businesses in Kennedale, Texas.

A postage-paid, self-addressed envelope has been enclosed for your convenience. The City of Kennedale sincerely thanks you for your time and attention to this matter.

ADULT VIDEO STORE SURVEY

Please base your responses on the facts presented below:

- *The city has a population of approximately 6,500 residents.*
- *The neighborhood contains a mixture of residential and commercial properties and there is presently one adult video store located in this neighborhood.*
- *For purposes of this survey, an adult video store is defined as a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration photographs, films, motion pictures, video cassettes, video reproductions, slides or other visual representations which are distinguished or characterized by an emphasis on matters depicting or describing specified sexual activities or specified anatomical areas.*
- *Adult videos may be rented or purchased, but may not be viewed at the store.*

1. Would you expect the average value of RESIDENTIAL property located within 500 feet of an adult video store to be affected by its proximity?

   _____ Yes _____ No

2. If you answered "yes" to question number 1, above, how would you expect the average value of RESIDENTIAL property within 500 feet of the adult video store to be affected?

   _____ Residential property values would be 10% or more below values of similar property not located within 500 feet of an adult video store.

_____ Residential property values would be from 0-10% below values for similar property not located within 500 feet of an adult bookstore.

_____ Residential property values would be from 0-10% higher than similar property not located within 500 feet of an adult bookstore.

_____ Residential property values would be more than 10% higher than similar property not located within 500 feet of an adult bookstore.

3. Would you expect the average value of COMMERCIAL property located within 500 feet of an adult video store to be affected by its proximity?

_____ Yes _____ No

4. If you answered "yes" to question number 3, above, how would you expect the average value of COMMERCIAL property within 500 feet of the adult video store to be affected?

_____ Commercial property values would be 10% or more below values of similar property not located within 500 feet of an adult video store.

_____ Commercial property values would be from 0-10% below values for similar property not located within 500 feet of an adult bookstore.

_____ Commercial property values would be from 0-10% higher than similar property not located within 500 feet of an adult bookstore.

_____ Commercial property values would be more than 10% higher than similar property not located within 500 feet of an adult bookstore.

5. Would you expect the average value of RESIDENTIAL property located within 800 feet of an adult video store to be affected by its proximity?

_____ Yes _____ No

6. If you answered "yes" to question number 1, above, how would you expect the average value of RESIDENTIAL property within 800 feet of the adult video store to be affected?

_____ Residential property values would be 10% or more below values of similar property not located within 800 feet of an adult video store.

_____ Residential property values would be from 0-10% below values for similar property not located within 800 feet of an adult bookstore.

_____ Residential property values would be from 0-10% higher than similar property not located within 800 feet of an adult bookstore.

_____ Residential property values would be more than 10% higher than similar property not located within 800 feet of an adult bookstore.

7. Would you expect the average value of COMMERCIAL property located within 800 feet of an adult video store to be affected by its proximity?

_____ Yes _____ No

8. If you answered "yes" to question number 3, above, how would you expect the average value of COMMERCIAL property within 800 feet of the adult video store to be affected?

_____ Commercial property values would be 10% or more below values of similar property not located within 800 feet of an adult video store.

_____ Commercial property values would be from 0-10% below values for similar property not located within 800 feet of an adult bookstore.

_____ Commercial property values would be from 0-10% higher than similar property not located within 800 feet of an adult bookstore.

_____ Commercial property values would be more than 10% higher than similar property not located within 800 feet of an adult bookstore.

9. Would you expect the average value of RESIDENTIAL property located within 1000 feet of an adult video store to be affected by its proximity?

_____ Yes _____ No

10. If you answered "yes" to question number 5, above, how would you expect the average value of RESIDENTIAL property within 1000 feet of the adult video store to be affected?

_____ Residential property values would be 10% or more below values of similar property not located within 1000 feet of an adult video store.

_____ Residential property values would be from 0-10% below values for similar property not located within 1000 feet of an adult bookstore.

_____ Residential property values would be from 0-10% higher than similar property not located within 1000 feet of an adult bookstore.

_____ Residential property values would be more than 10% higher than similar property not located within 1000 feet of an adult bookstore.

11. Would you expect the average value of COMMERCIAL property located within 1000 feet of an adult video store to be affected by its proximity?

_____ Yes _____ No

12. If you answered "yes" to question number 7, above, how would you expect the average value of COMMERCIAL property within 1000 feet of the adult video store to be affected?

_____ Commercial property values would be 10% or more below values of similar property not located within 1000 feet of an adult video store.

_____ Commercial property values would be from 0-10% below values for similar property not located within 1000 feet of an adult bookstore.

_____ Commercial property values would be from 0-10% higher than similar property not located within 1000 feet of an adult bookstore.

_____ Commercial property values would be more than 10% higher than similar property not located within 1000 feet of an adult bookstore.

13. Would you expect the presence of an adult video store to adversely affect attracting new COMMERCIAL businesses to this neighborhood?

_____ Yes _____ No

14. Are you aware of the existence of sexually oriented businesses in the City of Kennedale?

_____ Yes _____ No

15. Generally, what is your opinion as to the effect of sexually oriented businesses on the surrounding properties?

_____ Cause a decrease in the market value and marketability of surrounding properties

_____ Have no effect on the market value and marketability of surrounding properties

_____ Cause an increase in the market value and marketability of surrounding properties

Specifically, how do you think an adult video store affects the value of surrounding property located in Tarrant County, Texas?

_____

_____

_____

Appendix B

ADULT
ENTERTAINMENT
BUSINESSES IN
INDIANAPOLIS

AN ANALYSIS 1984

ADULT ENTERTAINMENT BUSINESSES
IN INDIANAPOLIS

AN ANALYSIS

Department of Metropolitan Development
Division of Planning
February, 1984

SUMMARY AND RECOMMENDATIONS

SUMMARY AND RECOMMENDATIONS

During the past ten years, Indianapolis has experienced a significant growth in the number and variety of adult entertainment businesses located in its jurisdiction. An adult entertainment business, for the purposes of this study, is an establishment which primarily features sexually stimulating material or performances. As of mid-1983 there were sixty-eight such businesses operating in this City. They were located at forty-three separate sites.

The proliferation of these businesses heightened the community's awareness of their existence and resulted in numerous requests that the City control their presence. Beyond the moral objections raised by many citizens, it was

also alleged that such businesses had a detrimental effect on property values and contributed to high crime rates where they were located.

The Indianapolis Division of Planning undertook this study in July of 1983. Of the existing adult entertainment sites, the study examined six representative locations (the Study Area) and the presence - or lack thereof - of certain relevant conditions therein. It then compared these sites with six physically similar locations (the Control Area) containing no adult entertainment business. Both groups of sites were compared with the City as a whole.

Because of their importance to the public welfare of the community, the study examined the factors of crime incidence during the period 1978-1982 and real estate value appreciation from 1979-1982. In support of limited real estate data on a small area level, the City collaborated with Indiana University in a national survey of real estate appraisers to develop a "best professional opinion" as to the effect of adult entertainment businesses on surrounding real estate values.

As discussed in Appendix III of this report, case law has firmly established the legal and constitutional basis for control of the use of land within their jurisdiction by states and municipalities in order to safeguard "the public health, safety, morals and general welfare of their citizens". The "public welfare", in this context, embraces the stabilization of property values and the promotion of desirable home surroundings. On the other hand, case law has also upheld the right of this business sector to operate in the community under the First and Fourteenth Amendments of the Constitution.

In establishing an empiric base to determine whether controls were warranted in order to direct the location of these businesses, analyses of the data showed:

- The average major crime rate (i.e., crimes per 10,000 population) in the IPD District was 748.55, the Control Area 886.34, and the Study Area 1090.51. Major crimes occurred in areas of the study that contained at least one adult entertainment establishment at a rate that was 23% higher than the six similar areas studied not having such businesses and 46% higher than the Police District at large.

- Although it was impossible to obtain a discrete rate for sex-related crimes at the police district level, it was possible to compare rates between the Control Areas and the Study Areas. The average sex-related crime rate in the Control Areas over the five year period was 26.2, while that rate for the Study Areas was 46.4.

- If the ratio of sex-related crimes was the same as that established for major crimes between the Control Area and the Study Area, however, we would expect a sex-related crime rate of 32.3. The actual rate of 46.4 is 77% higher than that of the Control Areas rather than the 23% that would be expected and indicates the presence of abnormal influences in the Study Areas.

- Close examination of crime statistics within the Study Areas indicate a direct correlation between crime and the residential character of the neighborhood. Crime frequencies were 56% higher in residential areas of the study than in its commercial areas.

- At the same time, sex-related crimes occurred four times more frequently within residential neighborhoods having at least one adult entertainment business than in neighborhoods having a substantially district-related commercial make-up having adult entertainment.

- Although the housing base within the Study Areas was of a distinctly higher value than that of the Control Areas, its value appreciated at only one-half the rate of the Control Areas' and one-third the rate of Center Township as a whole during the period 1979-1982.

- Pressures within the Study Areas caused the real estate market within their boundaries to perform in a manner contrary to that within the Control Areas, Center Township and the County. In a time when the market saw a decrease of 50% in listings, listings within the Study Areas actually increased slightly.

- As a result, twice as many houses were placed on the market at substantially lower prices than would be expected had the Study Area's market performance been typical for the period of time in question.

- The great majority of appraisers (75%) who responded to a national survey of certified real estate appraisers felt that an adult bookstore located within one block would have a negative effect on the value of both residential (80%) and commercial (72%) properties. 50% of these respondents foresaw an immediate depreciation in excess of 10%.

- At a distance of three blocks, the great majority of respondents (71%) felt that the impact of an adult bookstore fell off sharply so that the impact was negligible on both residential (64%) and commercial (77%). At the

same time, it appears that the residual effect of such a use was greater for residential than for commercial properties.

- In answer to a survey question regarding the impact of an adult bookstore on property values generally, 50% felt that there would be a substantial-to-moderate negative impact. 30% saw little or no impact, and 20% saw the effect as being [unreadable] on factors such as the predominent values (property and [unreadable] existing in the neighborhood, the development standards imposed on the use, and the ability of an existing commercial [unreadable] to buffer the impact from other uses.

While the statistics assembled and analyzed in this study should not be construed as proving that adult businesses cause the negative impacts illuminated herein, an obvious variable in each instance of comparison is their presence. Crime rates – particularly those that are sex-related – show substantial deviation from normal rates for this population. Analyses of real estate listings and sales show a negatively abnormal performance of the real estate market in areas where adult entertainment is offered. In this latter case, the best professional judgment available indicates overwhelmingly that adult entertainment businesses – even a relatively passive use such as an adult bookstore – have a serious negative effect on their immediate environs.

Consequently, it would seem reasonable and prudent that the City exercise its zoning power to regulate the location of adult entertainment businesses so that they operate in areas of the community that, while accessable to their patrons, are yet located in districts that are least likely to injure the general welfare of residents.

IT IS, THEREFORE, RECOMMENDED:

- THAT ADULT ENTERTAINMENT BUSINESSES BE ALLOWED TO LOCATE IN AREAS THAT ARE PREDOMINANTLY ZONED FOR DISTRICT-ORIENTED COMMERCIAL ENTERPRISES – I. E., C4 OR MORE INTENSE USE CATEGORIES.

- THAT NO ADULT ENTERTAINMENT BUSINESS BE ALLOWED TO LOCATE IN AREAS THAT ARE PREDOMINANTLY ZONED FOR NEIGHBORHOOD-ORIENTED COMMERCIAL ENTERPRISES – I. E., C3 OR LESS INTENSIVE USE CATEGORIES.

- THAT EACH LOCATION REQUIRE A SPECIAL EXCEPTION WHICH, AMONG OTHER CONSIDERATIONS, WOULD REQUIRE APPROPRIATE DEVELOPMENT STANDARDS DESIGNED TO BUFFER AND PROTECT ADJACENT PROPERTY VALUES.

- THAT THESE USES NOT BE ALLOWED TO LOCATE WITHIN 500 FEET OF A RESIDENTIAL, SCHOOL, CHURCH OR PARK PROPERTY LINE NOR WITHIN 500 FEET OF AN ESTABLISHED HISTORIC AREA.

INTRODUCTION

As is the case in most large cities, Indianapolis has experienced a rapid growth in the number and variety of adult entertainment businesses over the past ten years. As of June, 1983 there were sixty-eight such businesses located singly and in clusters throughout Marion County.

For the purpose of this study, the term "adult entertainment business" is a general term utilized to collectively designate businesses which primarily feature sexually stimulating material and/or performances. These non-exclusively include adult bookstores, adult caberets, adult drive-in theaters, adult mini motion picture theaters and arcades, adult entertainment arcades and adult service establishments.

These enterprises have posed a particular problem due, in part, to the moral implications attendant upon such businesses in the minds of many members of the community. While this is, perhaps, the view of the majority, case law on the subject has clearly established that the exclusion of such businesses from a community is an infringement of First Amendment rights. The proliferation of such businesses providing various forms of adult entertainment in Marion County has exacerbated this dilemma and given rise to additional charges of negative impacts on neighborhoods in proximity to their location.

Through the use of their zoning power, cities have within the past half century directed the physical growth of communities in order to assure a harmonious blend of land uses which foster the general welfare of the population. This power has been applied more recently to adult entertainment businesses in many communities and has served as a prime means of controlling possible negative impacts on neighborhoods.

This study was undertaken to examine these alleged negative impacts with the purpose of empirically establishing, to the extent possible, their existence or non-existence as well as their real dimensions in Indianapolis. The possible relationships between these impacts and the land use characteristics of the sites in which they are offered were also examined to ascertain whether certain land use classifications

were better suited than others for the location of adult entertainment businesses.

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METHODOLOGY

STUDY METHODS

As described below, the study methodology employs the comparison of different land areas in Indianapolis. The two basic areas of comparison are Study Areas and Control Areas. They are distinguished by the existence of adult entertainment establishments within their boundaries (the Study Areas) or the absence thereof (the Control Areas).

These two designations are further differentiated as to the general purpose or emphasis of the land uses they contain. Those that generally serve the immediately surrounding residential uses are termed "Neighborhood-Related" while those that contain uses meant to serve a boarder geographic area are designated "Community-Related."

STUDY SITE LOCATIONS

At the time of the study's inception, there were at least forty-three possible, distinct sites in Indianapolis where adult entertainment was offered either singly or in clusters of establishments. For manageability purposes, it was decided to select six of these sites that were representative. In choosing these subject locations (as well as the Control Areas of the study), the determinant characteristics were their zoning mix, population size and the relative age of housing stock. In each case, adult entertainment was offered during the time span of the study.

The selection process was additionally based on the number of establishments located in a given neighborhood, whether it was residential in nature and therefore neighborhood-related,

or contained a significant portion of its land use in regional, commercial uses which made it community-related.

The designation "Neighborhood-Related" was applied where a preponderance ((75%) or more) of the area [unreadable] was zoned D1 through D12 (residential dwelling [unreadable], and the commercial areas were neighborhood-related [unreadable] C3 (a neighborhood commercial classification). Special Use designations were judged to be neighborhood-related or not on an individual basis. SU1 (church) and SU2 (school), for example, were judged to be generally neighborhood-related.

"Community-Related" areas were described as areas where a significant proportion (30% or more) of the zoning within the 1000-foot radius was C4 (Community-Regional Commercial) or more intense and the Special Uses within the boundaries were of a community-wide nature. SU6 (hospital) and SU21 (cemetery) were judged, therefore, to be related to the community generally.

Within these two broad classifications, six locations were chosen. Two of them were situated in residential settings, two in regional-commercial settings and two in areas that fell in between, i.e., areas that had a high percentage of residential zoning but also contained a certain proportion of regionally oriented commercial zoning. These six locations became the Study Areas of this investigation. (cf. Appendix I)

AREA ZONING CHARACTERISTICS - STUDY AREAS

SITE	CHARACTERISTICS			
	Residential	Commercial	Special	Parks
Residential				
1. 5431 East 38th St.	D4=82%	C1=7% C3=8%	SU1=3%	-
2. 3155 East 10th St.	D5=75%	C3=24%	SU9=1%	-
Coml./Residential				
3. 3555 West 16th St.	D5=78%	C4=22%	-	-
4. 2101 W. Washington	D5=60%	C3=3% C4=18%	SU2=17%	PK1=2%
Commercial				
5. 6116 E. Washington	D5=65% D8=5%	C4=30%	-	-
6. 4441-63 N. Keystone	D5=15%	C2=5% C3=10% C5=40%	11U=12% 12U=13%	PK2=5%

Of the two sites chosen in residential areas, one contained an adult bookstore (Apollo Adult Books, 5431 East 38th St.) and a massage parlor (Eve's Garden of Relaxation, 5429 East 38th St.) The other residential location contained an adult movie house (Rivoli Theater, 3155 East 10th St.) and a topless bar (Ten-De Club, 3201 East 10th St.)

One of the commercial/residential areas had a topless bar within its boundaries (Blue Moon Saloon, 2101 West Washington), while the other harbored the White Front Bar which featured topless dancing (3535 West 16th St.)

The two commercial areas chosen were in the sixty-one hundred block of East Washington St. and the forty-four hundred block of North Keystone. The first site contained two adult bookstores (Modern Art Bookstore at 6118 and Adult Arcade at 6122) and a massage parlor (Spanish Moon at 6116). The North Keystone location contained four massage parlors (Other World, 4441, Diamond's Angels, 4445, Pleasure Palace, 4461, and Town and Country, 4463), two adult bookstores (Video World, 4447 and Adult Bookstore, 4475) as well as a topless lounge (Devil's Hideaway, 4451).

Six areas were also selected to serve as control sites for the study. These sites were chosen on the basis of their proximate location to the Study Areas (or their location on major thoroughfares in areas physically similar in location and types of development), size or population and zoning characteristics. None contained adult entertainment businesses. Selection was also made so that two of the sites were in predominantly residential areas, two in commercial areas and two in areas that contained a significant mix of residential and regional commercial zoning. These six sites became the Control Areas of the study, (cf. Appendix I.)

AREA ZONING CHARACTERISTICS - CONTROL AREAS

SITE	CHARACTERISTICS			
	Residential	Commercial	Special	Parks
Residential				
1. 2300 West 10th St.	D5=82%	C1=4% C3=14%	-	-
2. 2500 East 10th St.	D5=80%	C2=12% C3=8%	-	-
Coml./Residential				
3. 5420 E. Washington	D5=62% D6=8% D8=10%	C3=1% C4=19%	-	-
4. 2600 W. Washington	D5=35% D4=34%	C1=2% C2=1% C5=13% C7=8%	SU1=3% SU2=3%	-

AREA ZONING CHARACTERISTICS - CONTROL AREAS (cont'd)

SITE	CHARACTERISTICS			
	Residential	Commercial	Special	Parks
Commercial				
5. 5200 N. Keystone	D2 = 7% D4 = 2% D5 = 15% D7 = 6%	C1 = 4% C3 = 9% C5 = 25% C7 = 20% CS = 2%	11U = 10%	-
6. 750 N. Shadeland	D2 = 3% D3 = 15% D7 = 3%	C4 = 49% C5 = 10% CS = 5%	SU1 = 15%	-

AREA ZONING CHARACTERISTICS

	NEIGHBORHOOD-RELATED	COMMUNITY-RELATED
Residential		
Study Area		
1.	100%	-
2.	99%	1%
Control Area		
1.	100%	-
2.	100%	-
Coml./Residential		
Study Area		
3.	78%	22%
4.	82%	18%
Control Area		
3.	81%	19%
4.	78%	22%

AREA ZONING CHARACTERISTICS (cont'd)

Commercial	NEIGHBORHOOD-RELATED	COMMUNITY-RELATED
Study Area		
5.	70%	30%
6.	35%	65%
Control Area		
5.	43%	57%
6.	36%	64%

STUDY SITE COMPARISONS

Throughout the following analyses, a series of comparisons are made at several different levels of geography: i.e., County/Police District; Census Tract/Census Tract Cluster; and Control/Study Area.

Large Area

When dealing with crime statistics, the Indianapolis Police Department District is used as the largest universe of comparison. In the case of real estate information, Marion County is used as the largest geographic area of comparison. Center Township is also used as a basis of comparison in the analysis of adult entertainment impacts on property values.

Mid-Size Area

Intermediate geographic levels used for comparison in the study were census tracts when study sites were centrally located within their boundaries. Where they were not, those census tracts in proximity to the site were chosen as the basis of comparison.

CENSUS TRACTS/TRACT CLUSTERS
Study/Control Areas

	1	2	3	4	5	6
Control Areas	3412	3527	3611	3414	3216	3606
	2416	3547	3612	3426	3217	3607
		3548				3608
Study Areas	3310	3526	3411	3414	3607	3216
	3601	3548		3426		3224
		3549		3538		3225
						3226

Sub-Area

The Control Areas and the Study Areas, as described above, formed the smallest geographic group of the study. These target areas were constituted using the criteria listed in the previous section of this report and data derived for them by aggregating block-level or addressed data within a 1000-foot radius of the area centroid.

1980 CENSUS TRACTS MAP
ADULT ENTERTAINMENT BUSINESS STUDY

[MAP OMITTED]

CRIME INCIDENCE

CRIME INCIDENCE

The Data Processing Unit of the Indianapolis Police Department performed two computer runs of their "Incidence Files"[1] in August of 1983 at the request of the City Division of Planning. The resultant printouts detailed all reported incidents to which police had been dispatched in the Control Areas and the Study Areas during the years 1978, 1979, 1980, 1981 and 1982. Data were assembled from these printouts on

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[1] The Incidence File is a computerized listing of all reports made by police after initial investigation of an incident to which they were dispatched. It, therefore, provides a more reliable indication of crime incidence than the computerized "Police Run" file which logs police dispatches based on preliminary information on the incidents.

a year-by-year, area-by-area basis. They were then grouped by Major Crimes[2] and Sex-Related Crimes.[3]

Summary data for the Indianapolis Police District were also assembled for major crimes during the years 1978 through 1982. Unfortunately, sex-related crimes had not been discreetly assembled for the Police District and study constraints would not allow their tabulation manually.

The purpose of these tabulations was to identify any possible abnormalities that might have occurred in expected frequency and nature of crime between the Indianapolis Police District, the Control Areas which were chosen for their similarity to the Study Areas and the Study Areas themselves in which adult entertainment establishments were in operation.

As was demonstrated in the previous section, the Study Area locations were chosen as being representative of existing adult entertainment sites in zoning mix, size of population, age of housing stock and types of adult entertainment services offered in the area. Excepting the latter, these same criteria were used in the choice of Control sites. Because they were representative, it is possible to compare Control and Study Areas as well as infer findings to other adult entertainment locations in the community.

Based on the summaries of crimes, crime rates were computed for each area using 1980 Census data as the population

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[2] Criminal Homicide, Rape, Robbery, Aggravated Assault, Residence Burglary, Non-Residence Burglary, Larceny and Vehicle Theft.

[3] Rape, Indecent Exposure, Obscene Conduct, Child Molestation, Adult Molestation and Commercial Sex.

constant.[4] The crime rate statistics portrayed the frequency of crime in each area for each 10,000 of population and allowed direct comparison of crime impacts between the three areas. The same technique was used to compare the magnitude of sex-related crime in the Control Areas and the Study Areas.

MAJOR CRIMES

The crimes of Criminal Homicide, Rape, Robbery, Aggravated Assault, Residence and Non-Residence Burglary, Larceny and Vehicle Theft are reported on a monthly basis by the Indianapolis Police Department as Major Crimes. During the period of this study (1978-1982), there were 175,796 major crimes reported in the IPD District with an annual high of 37,220 occuring in 1980. The crime rate for this year was 792.42 in the police district.

This represented an increase of 2,115 major crimes over the previous year total and an increase of 6% in the crime rate. The lowest annual total in the study period (33,898) was reported in 1981 which represented a drop of 10% in the crime rate from the previous year.

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[4] Since population estimates were not available for each year of the survey, the 1980 Census figures were used because they were the result of an actual enumeration and, falling at the mid-point of the survey, they would tend to balance out population trends during the five year time span.

Indianapolis Police District Major Crimes/Rates
1978-1982

Population - 469,700

	1978	1979	1980	1981	1982
Murder	78/1.62	92/1.98	107/2.28	85/1.38	88/1.47
Rape	341/7.26	439/9.35	410/8.73	400/8.52	367/8.24
Robbery	1983/41.79	2053/43.71	2193/48.89	2194/46.71	1993/42.43
Aggravated Assault	1353/28.81	1594/33.94	1743/37.11	1880/40.03	1892/40.28
Residence Burglary	6346/135.11	6538/139.20	7495/158.67	7877/163.45	7783/185.70
Non-Residence Burglary	2392/50.93	2011/42.82	2579/54.91	2308/49.14	2213/47.12

Indianapolis Police District Major Crimes/Rates (cont'd)
1978-1982

Population - 469,700

	1978	1979	1980	1981	1982
Larceny	18892/397.96	18927/402.98	18908/402.51	18782/357.28	17497/372.51
Vehicle Thefts	3874/78.22	3451/73.47	3787/80.63	2592/55.18	2902/61.78
Total	34837/741.89	35105/747.39	37220/792.42	33898/721.70	34736/739.54
				Total Crime:	175,798

Per 10,000 Population

Over the same period of time, the Control Area for this study had 5,170 major crimes committed within its boundaries – the highest number occurring in 1980 when 1,099 crimes were reported. The crime rate for this year was 942.05 in this area. This is compared to the lowest total of 912 and a crime rate of 781.76 for 1978. This represented an absolute difference of 187 total major crimes and a difference of 21% in the crime rate (160.29).

Control Area Major Crimes/Rates* 1978-1982

(Population - 11,866)

	1978	1979	1980	1981	1982
Murder	1/0.85	4/3.43	3/2.57	5/4.29	2/1.71
Rape	8/6.86	12/10.29	15/12.86	8/6.86	13/11.14
Robbery	37/31.72	44/37.72	44/37.72	50/42.86	36/30.86
Aggravated Assault	19/16.28	35/30.00	29/24.86	30/25.72	37/31.72
Residence Burglary	151/129.42	229/196.30	262/224.58	272/233.16	168/169.72
Non-Residence Burglary	71/60.86	50/42.86	62/53.15	59/50.57	79/67.72

Control Area Major Crimes/Rates* 1978-1982 (cont'd)

Population - 11,866

	1978	1979	1980	1981	1982
Larceny	484/414.88	544/466.31	574/492.03	562/594.03	579/436.31
Vehicle Theft	141/120.88	112/96.01	110/94.29	83/71.15	80/77.15
Total:	912/781.76	1,030/382.91	1,099/942.05	1,095/938.53	1,034/556.34

Total: 5,170

Average: 866.34

*Per 10,000 Population

During the period 1978-1982, 4,657 major crimes were committed in the Study Area. As in the IPD District and the Control Area, the greatest volume of major crimes (1,103) occurred in 1980 which had a crime rate of 1,291.42. The fewest number of crimes in the study's time frame was 867 in 1978 which represented a differencial in the total number of major crimes reported and the rate of crime of -236 and -276.32 respectively from 1980.

Study Area Major Crimes/Rates* 1978-1982

(Population - 8,541)

	1978	1979	1980	1981	1982
Murder	3/3.61	0/-	2/2.34	5/5.85	0/-
Rape	3/3.51	12/14.05	11/12.88	9/10.54	8/9.37
Robbery	55/64.40	53/62.05	58/67.91	26/30.44	44/51.52
Aggravated Assault	25/29.27	18/21.08	22/26.76	18/18.73	29/33.95
Residence Burglary	161/188.50	200/234.17	244/285.68	190/222.46	189/221.29

Study Area Major Crimes/Rates* 1978-1982 (cont'd)

(Population - 8,541)

	1978	1979	1980	1981	1982
Non-Residence Burglary	82/96.01	58/67.91	80/93.67	65/76.10	64/74.93
Larceny	462/540.92	450/526.87	586/686.10	560/655.66	464/543.26
Vehicle Theft	76/88.98	90/105.37	100/117.08	60/70.25	77/90.15
Total:	867/1015.10	881/1031.50	1103/1291.42	931/1090.04	875/1024.47
				Total:	4,657
*Per 10,000 Population				Average:	1090.51

The frequency of crimes in the IPD District, the Control Areas and the Study Areas showed approximately the same pattern. In each of the areas, the number of major crimes increased from 1978 to 1980 when they peaked. Subsequent years showed frequency levels below the 1980 high.

The average crime rate figure for the Indianapolis Police Department District was 748.55. The Control Area had a rate that was 137.79 higher than the overall police district, whereas the Study Area was 204.17 points higher than the Control Area. In other words, people living in the Control Area of the study were exposed to a major crime rate in their neighborhoods that was 18% higher than that of the IPD population generally.

Residents of the Study Area, however, were exposed to a major crime rate that was 23% higher than that of the Control Area and 46% higher than the population of the IPD District as a whole.

MAJOR CRIME RATE 1978-1982

[GRAPH OMITTED]

[unreadable] to examine crime rates within the Control [unreadable] in relation to the land use characteristics [unreadable] in which they occurred.

[unreadable] provide a better understanding of actual impact [unreadable] of the area than crime frequencies in that [unreadable] a ratio of crime to each 10,000 of popula- [unreadable] this way, they tell us just how vulnerable a neigh- [unreadable] is historically to crime within its boundaries.

1978-1982 ANNUAL AVERAGE MAJOR CRIME RATE BY LAND USE

Area	Commercial			Coml./Res.			Residential		
Control	Pop.	Crimes	Ann. Rt.	Pop.	Crimes	Ann. Rt.	Pop.	Crimes	Ann. Rt.
1.	379	240	1267						
2.	523	1147	4386						
	902	1387	3075						
3.				2828	837	592			
4.					705	592			
				2382					
				5210	1542	592			
5.							2159	1173	1087
6.							3395	1067	629
							5554	2240	807

1978-1982 ANNUAL AVERAGE MAJOR CRIME RATE BY LAND USE (cont'd)

Area	Commercial			Coml./Res.			Residential		
Study	Pop.	Crimes	Ann. Rt.	Pop.	Crimes	Ann. Rt.	Pop.	Crimes	Ann. Rt.
1.	219	439	4009						
2.	1218	831	1365						
	1437	1270	1768						
3.				1015	834	1643			
4.				1203	653	1086			
				2218	1487	1341			
5.							3656	1232	674
6.							1230	668	1086
							4886	1900	778

[unreadable], we find that this impact is 74% higher in dis- [unreadable] commercial areas of the Control Area than similar dis- [unreadable] commercial areas of the Study Area. However, while the [unreadable] is approximately the same in the residential areas of [unreadable] the Study Area exhibits a crime rate that is 127% high- [unreadable] the Control Area in locations that are mixed district- [unreadable] and residential in nature.

SEX-RELATED CRIME[5]

Crimes of Rape, Indecent Exposure, Obscene Conduct, Child Molestation, Adult Molestation and Commercial Sex were segregated and then aggregated from police printouts of total crime incidence occurring within the Study Area and the Control Area for the period 1978-1982. A total of 153 sex-related crimes was reported in the Control area during this period, with a high of 39 having occurred in 1979. During the same period, the Study Area experienced 198 sex-related crimes, reaching a high of 52 in 1981.

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[5] Sex-related crimes are not isolated and compiled on a routine basis for the IPD District as a whole. A manual compilation of these data was proscribed by the time limitations of the study.

Control Area Sex-Related Crimes/Rates* 1978-1982

(Population - 11,666)

	1978	1979	1980	1981	1982
Rape	8	13	15	8	12
Indecent Exposure	7	10	9	13	4
Obscene Conduct	0	2	0	0	1
Child Molestation	6	10	4	8	12
Adult Molestation	2	3	0	1	3
Commercial Sex	0	1	1	0	0
Total:	23/19.7	39/33.4	29/24.9	30/25.7	32/27.4

Total: 153

*Per 10,000 Population

Study Area Sex-Related Crimes/Rates* 1978-1982

(Population - 8,541)

	1978	1979	1980	1981	1982
Rape	2	12	11	10	9
Indecent Exposure	10	14	12	5	7
Obscene Conduct	0	0	0	1	0
Child Molestation	6	9	5	11	8
Adult Molestation	1	0	0	0	3
Commercial Sex	1	8	16	25	13
Total:	19/22.3	43/50.4	44/51.6	52/60.9	40/46.8

Total: 198

*Per 10,000 Population

SEX-RELATED CRIME RATE 1978-1982

[GRAPH OMITTED]

Whereas sex-related crime rates in the Control Areas varied from a low of 19.7 in 1978 to a high of 33.4 in 1979, the Study Areas increased from a low of 22.3 in 1978 to its peak of 60.9 in 1981.

The average sex-related crime rate in the Control Area was 26.2 over the five year period. The rate in the Study Area was approximately 77% higher than this average during the same period of time at 46.4.

Comparing the crime rate for sex-related crimes by land use categories in the Control and Study Areas, a different pattern than that for major crime rates emerges.

1978-1982 ANNUAL AVERAGE SEX-RELATED CRIME RATE BY LAND USE

Area	Commercial			Coml./Res.			Residential		
Control	Pop.	Crimes	Ann. Rt.	Pop.	Crimes	Ann. Rt.	Pop.	Crimes	Ann. Rt.
1.	379	2	11						
2.	523	7	27						
	902	9	20						
3.				2828	35	25			
4.				2382	29	24			
				5210	64	25			
5.							2159	49	45
6.							3395	29	17
							5554	78	28

1978-1982 ANNUAL AVERAGE SEX-RELATED CRIME RATE BY LAND USE (cont'd)

Area	Commercial			Coml./Res.			Residential		
Study	Pop.	Crimes	Ann. Rt.	Pop.	Crimes	Ann. Rt.	Pop.	Crimes	Ann. Rt.
1.	219	5	46						
2.	1218	23	38						
	1437	28	39						
3.				1015	38	75			
4.				1203	32	53			
				2218	70	63			
5.							3656	69	38
6.							1230	31	50
							4886	100	41

8-1982 Annual Average Sex-Related Crime Rates:
Selected Areas

[GRAPH OMITTED]

Whereas major crimes rates were similar in residential areas of the Control and Study Areas, the Control Area rate was substantially higher in district commercial areas and lower in mixed district commercial/residential areas. In contrast to this, the sex-related crime rate was uniformly higher in all land use categories of the Study Area, ranging from +46% in residential areas to +152% in district commercial/residential areas.

SUMMARY OF FINDINGS

Both the Control and the Study Area experienced a significantly higher incidence of major crimes/10,000 population than the IPD Districts as a whole. Much of this increase would be expected given their location in generally older, less affluent and more populous areas of the city.

It is more difficult to explain the distinctly higher crime rate experienced in the Study Areas as compared to the Control Area - 1,090.51 versus 886.34.

This dicotomy is even more apparent in the instance of sex-related crime rates in the two areas. The average sex-related crime rate in the Control Areas was 26.2. The Study Areas had an average rate of 46.4.

If the same ratio between the Control and Study Areas established for major crime during this period were applied, we would expect a crime rate that was 23% higher - or 32.3 - in the Study Areas. The actual rate of 46.4 is 77% higher

than that of the Control Area and underscores a distinct departure from the expected. Not only is the rate substantially higher in the Study Area, but it is twice the rate that would have been expected from the distribution of crimes generally in Indianapolis.

The anomalies demonstrated in the comparison of the Study Area with the general population and the Control Area will not, in themselves, establish a causal relationship between Adult Entertainment Businesses and the crime rates in the immediate area surrounding them. The fact does remain, however, that in each subsection of the Study Areas where adult entertainment is offered a substantially higher sex-related crime presence obtains over the corresponding subsections of the Control Area in which no adult entertainment is offered. The same is true regarding the rate of major crimes.

In areas chosen for their similarities otherwise, an obvious difference lies in the presence of one or more adult entertainment establishments.

CRIME INCIDENCE

CRIME IMPACT BY AREA TYPE

IMPACT BY AREA TYPE

As it will be noted, sample size poses a distinct problem when attempting analysis at the small area level. This is particularly true in the instance of mortgage information. Due to this inadequacy, it is impossible to compare the impact of adult entertainment businesses on residential property value below a certain level of geography.

This is not the case, however, with crime statistics. In this case it is possible to compare sub-areas of the target areas since the comparisons are based on the actual instance of crime in the areas (unlike mortgage data where average value is the basis of comparison.)

Ths sub-area comparisons were based on the nature of the areas in relation to their land use composition as determined by the Comprehensive General Land Use Plan of Marion County. Four sub-areas were of a distinct regional commercial nature, four were residential in nature and four were of a mixed residential-commercial makeup.

The three groupings were compared with each other to determine if crime, from a historical viewpoint, occurred more frequently in areas of one land use configuration than another.

Whether or not crime frequencies, at least in part, are determined by the land use characteristics in which they were committed cannot be definitively answered here. Several striking patterns do emerge from the comparison, however.

CRIME FREQUENCIES BY AREA TYPE

Of the 9,829 major crimes committed in the Control and Study Areas during 1978-1982, 27% were perpetrated in regional commercial areas, 31% in mixed commercial-residential areas and 42% in predominantly residential areas. In other words, crime frequencies were 56% higher in residential areas than commercial areas while mixed commercial-residential areas were 37% higher than commercial areas.

The following table displays major crime frequencies for the five year period by type of area, the existence or non-existence of adult entertainment and specific location.

MAJOR CRIME FREQUENCY

	1978	1979	1980	1981	1982	Tot.	%
District Commercial							
Study Area							
No. Keystone	83	71	112	87	86	439	
E. Washington	150	152	202	186	141	831	
	233	223	314	293	227	1270	
Control Area							
No. Shadeland	38	41	34	43	84	240	
No. Keystone	212	217	210	259	249	1147	
	250	258	244	302	333	1387	
						2657	27%

MAJOR CRIME FREQUENCY (cont'd)

	1978	1979	1980	1981	1982	Tot.	%
Mixed Res./Coml.							
Study Area							
W. Washington	123	184	190	185	152	834	
West 16th St.	177	128	140	104	104	653	
	300	312	330	289	256	1487	
Control Area							
W. Washington	110	182	211	184	150	837	
E. Washington	160	151	130	139	125	705	
	270	333	341	323	275	1542	
						3029	31%

MAJOR CRIME FREQUENCY (cont'd)

	1978	1979	1980	1981	1982	Tot.	%
Residential							
Study Area							
East 10th St.	219	235	294	242	242	1232	
East 38th St.	115	111	165	127	150	668	
	334	346	459	369	392	1900	
Control Area							
East 10th St.	211	239	269	210	243	1173	
West 10th St.	181	200	244	260	182	1067	
	334	346	458	369	392	3240	
						4140	43%

The pattern was similar in comparison of the frequency of sex-related crime within the three areas during the same period of time. It was more pronounced, however. Fifty-one percent of the total occurred in residential environments, while thirty-eight percent occurred in mixed commercial-residential areas. In comparison, only eleven percent of the total occurred in district commercial areas.

The following table displays sex-related crime frequencies for the five year period by type of area, the existence or non-existence of adult entertainment and the individual locations included in the study.

SEX-RELATED CRIME FREQUENCY

	1978	1979	1980	1981	1982	Tot.	%
District Commercial							
Study Area							
No. Keystone	-	2	2	-	1	5	
E. Washington	-	4	4	8	7	23	
	-	6	6	8	8	28	
Control Area							
No. Shadeland	-	-	-	-	2	2	
No. Keystone	1	3	1	1	1	7	
	1	3	1	1	3	9	
						37	11%

SEX-RELATED CRIME FREQUENCY (cont'd)

	1978	1979	1980	1981	1982	Tot.	%
Mixed Res./Coml.							
Study Area							
W. Washington	5	10	12	8	3	38	
West 16th St.	1	4	8	9	10	32	
	6	14	20	17	13	70	
Control Area							
W. Washington	3	8	11	8	5	35	
E. Washington	4	10	3	8	4	29	
						64	
						134	38%

SEX-RELATED CRIME FREQUENCY (cont'd)

	1978	1979	1980	1981	1982	Tot.	%
Residential							
Study Area							
East 10th St.	12	18	14	17	8	69	
East 38th St.	1	5	4	10	11	31	
	13	23	18	27	19	100	
Control Area							
East 10th St.	11	13	7	7	11	49	
West 10th St.	4	5	6	5	9	29	
	15	18	13	12	20	78	
	7	18	14	16	9	178	51%

These trends are not easily explained on the bases that "where there are more people there will be more crime." Community-related commercial areas draw clientele from a broad geographic area and can be expected to attract many times the residential population of the immediately surrounding area. This is the purpose of the district commercial zoning designation. Further, the transient nature of this population could be considered to contribute to the incidence of certain crimes.

Major Crimes/1978-1982, Selected Areas

[GRAPH OMITTED]

Sex-Related Crimes/1978-1982, Selected Areas

[GRAPH OMITTED]

SUMMARY OF FINDINGS

There appears to be a strong correlation between crime frequency and the residential character of neighborhoods, i.e., the more residential the nature of the neighborhood, the greater is the instance of crime in that neighborhood. Crime frequencies were, in fact, fifty-six percent higher in residential areas than district commercial areas.

The above correlation is even more acute when considering sex-related crimes. Sex-related crimes occurred four times more frequently in substantially residential milieus having one or more adult entertainment businesses than in commercial environments having one or more such businesses.

REAL ESTATE IMPACTS

This study also undertook the quantification of possible effects of the proximity of adult entertainment businesses on the value of residential properties within a one thousand foot radius of their locations.

In examining the potential impacts, three sources of residential property values were investigated: i.e., Indianapolis Residential Multiple Listing Summaries (MLS) of the Metropolitan Indianapolis Board of Realtors, the 1980 Census (tract and block occupied, single-unit housing valuation data); and, annual lending institution statements under the Federal Home Mortgage Disclosure Act (MDA).

Summary data from the MLS were available over the period 1979-1982, while actual mortgage values reported by lending institutions were available for the period 1977-1982. The U.S. Bureau of the Census provides homeowner estimates of home value at the time of the 1980 Census (April 1, 1980).

The data available from these three sources differ in other ways. The 1980 Census, while relying on homeowner estimates of the worth of property, is a 100 percent survey and is described down to the block level. Home Mortgage Disclosure Act data provide a record of actual mortgages processed and reported by local lenders (only a portion of the total volume). The lowest geographic level at which this information is available is the Census Tract and, even at this level, at times poses a difficulty with the available sample size. Multiple Listing Summaries generally reflect an estimate of worth based on current market conditions for the area and can be assembled at virtually any geographic level since they

are listed by address. As in the case of the Mortgage Disclosure Act statements, however, there are at times problems with the sufficiency of the sample size at the small area level.

Each of the data sets presents some weaknesses. Although the 1980 Census only reflects an estimate of housing value at one point in time, it has the advantage of being a 100 percent survey of occupied, single-unit housing. The other two sources offer time series data over periods of four and five years. They have the liability, however of sometimes lacking a sufficient sample size at the small area level in any given year to allow an acceptable level of statistical confidence.

Due to these characteristics of the data, certain modifications were made in the study's original intent. Rather than doing annual comparisons of housing value, 1979 was chosen as the comparison year and the 1980 Census data set chosen due to the ability to summarize it at the county, tract and block level.

The geographic levels of comparison were the County as a whole, the Census Tract or Tract cluster in which the Study or Control Areas were located and the areas within a 1000-foot radius of the Study and Control location centroids.

A next step was to use the data available on real estate activity in the Multiple Listing Summaries to establish market performance between 1979 and 1982 in both the Control and Study Areas.* The results were compared to real estate activity in the residential market of Center Township which,

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* Whereas the sample size is sufficient in most years to provide acceptable confidence levels for mortgage averages, the sample is only marginally acceptable in 1981 and 1982 for the Control Area.

in terms of value and general housing condition, most closely resembles the two areas among the nine Marion County townships.

COMPARISON RESULTS

AVERAGE MORTGAGE VALUES - 1979

Marion County[1]	$ 41, 854	
	Control Areas	Study Areas
Tract/Tract Clusters[1]	$ 31,858	$ 28,003
[Track/Tract Clusters[2]]	[27,872]	[21,605]
1000-Foot Radius[1]	23,721	24,616
[1000-Foot Radius[3]]	[16,038]	[23,823]

1. Source: 1980 Census.
2. Source: Home Mortgage Disclosure Act Statements.
3. Source: Residential Multiple Listing Summaries.

Comparison of the 1980 Census data would indicate that the value of housing in the areas addressed in this study are from 40 to 73 percent below the Marion County average. While the average value of housing at the census tract level was somewhat higher in the census tracts in which the Control Areas were located than those in which the Study Areas were located ($31,858 vs. $28,003), the opposite was true when comparing the target areas themselves. Housing values within 1000 feet of adult entertainment businesses in the Study Areas were greater (although by a lesser margin) than those in the Control Areas ($24,616 vs. $23,721).

This finding is borne out by an examination of actual mortgages executed within the affected census tracts of the Control and Study Areas, as well as real estate listings at the 1000-foot level.

Using mortgage and real estate listing data, we find that, while consistent with the Census data findings, the disparities were more acute. Average mortgages at the tract level were $27,872 vs. more acute. Average mortgages at the tract level were $27,872 vs. $21,605 in the Control and Study Area tract clusters respectively. At the 1000-foot level, real estate listing values in the Control Areas dropped to $16,038 while Study Area listings increased by approximately 10 percent over the average mortgage value in the tract clusters of the Study Area.

It would appear that, while property values at the tract cluster level are appreciably higher surrounding the Control Areas, housing within the Study Areas themselves is, on the average, of distinctly higher value than housing stock in the Control Areas.

TIME SERIES ANALYSIS RESULTS

During the period 1979 through 1982, mortgages processed in the Control Areas of the study showed an average annual appreciation rate of +24.7 percent. During the same time frame, mortgages appreciated at an average annual rate of only +8.7 percent in the Study Area. In comparison, residential mortgages in Center Township appreciated at a +16.7 percent average annual rate for the period.

AVERAGE MORTGAGE VALUES
1979-1982

	1979	1980	1981	1982	1979-1982 % Change
Control Area[1]	$16,038	$21,687	$22,650	$28,420	+ 77%
Study Area[1]	23,823	25,432	30,964	30,090	+ 26%
Center Township[2]	16,100	17,178	18,903	25,099	+ 56%

1. Source: Indianapolis Multiple Listings for Residential Prop.
2. Source: Home Mortgage Disclosure Act Statements.

MORTGAGE VALUES
% Change From Base Year (1979)

[GRAPH OMITTED]

REAL ESTATE LISTINGS
% Change From Base Year (1979)

[GRAPH OMITTED]

The average value of mortgages from 1979 to 1982 in Center Township increased by 56 percent while Control Area values increased by 77 percent and the Study Areas by 26 percent.

RESIDENTIAL REAL ESTATE ACTIVITY
1979-1982

	1979	1980	1981	1982	% Change
Control Area Listings[1]	29	23	15	15	- 52%
Study Area Listings[1]	28	28	26	29	+ 4%
Center Township Mortgages[2]	898	635	377	182	- 80%

1. Source: Indpls. Multiple Listings, Residential Properties.
2. Source: Home Mortgage Disclosure Act Statements.

Both Center Township and the Control Area followed general market trends in the volume of real estate activity, falling by 80 percent and 52 percent, respectively, from 1979 to 1982. Once again, the Study Area performed in an atypical fashion, actually registering a slight increase in volume (4 percent) over the same period.

CONCLUSIONS

While bearing in mind the above-mentioned difficulties in certain cases with the sample size at the sub-area level, the following observations may be made on analysis of the data.

A comparison of residential real estate listings indicates that the areas chosen in this study which have adult entertainment establishments within their boundaries have, on the average, a residential housing base of substantially higher value than that located in the areas chosen as control sites.

Despite the higher value of housing stock in the Study Areas, property values appreciated at only one-half the rate of the Control Area and at one-third the rate of Center Township as a whole.

Another anomaly apparent in analysis of real estate activity within the three areas is that market forces within the Study Areas were present which caused real estate activity within its boundaries to run completely contrary to County, Township and Control Area trends.

In summary, the available data indicate that twice the expected number of houses were placed on the market at substantially lower prices than would be expected had the Study Area real estate market performed typically for the period of time in question.

APPRAISER SURVEY

PROFESSIONAL APPRAISAL OF IMPACTS

Because of the great number of variables that have the potential to cause a particular real estate market to perform erratically at a small area level, it was decided to solicit a "best available professional opinion" from real estate appraiser regarding the market effect of adult entertainment businesses on proximate land values.

The Indianapolis Division of Planning approached the Indiana University School of Business' Division of Research for assistance in polling the real estate appraisal community on the subject. The University proposed that the survey be national in scope and offered to design and pretest the survey instrument. Dr. Jeffrey Fisher of the University's School of Real Estate collaborated in drafting the instrument and conducted the initial test at a workshop in early September. Analysis of this pretest indicated the need for minor adjustments to the form.

In its final format, the instrument (cf. Appendix II) posited a hypothetical middle income, residential neighborhood in which an adult bookstore was about to locate. Respondents were asked to numerically rate the impact of this business on both residential and commercial property values within one block and three blocks of the store. They were also asked to rate a number of potential other uses as to whether they would increase or decrease property values. Finally, survey participants were asked to express what they generally felt the effect of adult bookstores was on property values.

The survey sample was drawn at two levels. Using the membership of the American Institute of Real Estate

Appraisers as the survey universe, a twenty percent random sample of members was constructed for the entire nation. In addition, MAI (Member Appraisers Institute) members who practiced in 22 Metropolitan Statistical Areas[1] (MSAs – as defined by the U.S. Bureau of the Census) of a size similar to Indianapolis were surveyed at the one hundred percent level.

In January of 1984, 1527 questionnaries were mailed. As of February 22, 507 (33%) had been returned. These returns were split evenly between the 20% (249 returns) and 100% (258 returns) samples. In the national sample the rate of return by geographic region[2] was fairly consistent: East, 41 – 27%; North Central, 56 – 28%; South, 89 – 25%; and West, 63 – 24%. Return rates from the 100% MSA survey varied from 14% from Newark, N.J. to 62% from Cleveland, OH.

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[1] Metropolitan Statistical Areas (MSAs) surveyed at 100% were chosen on the basis of having a one to two million population at the time of the 1980 U.S. Census. They were: Phoenix, Arizona; Sacramento, San Diego and San Jose, California; Denver/Boulder, Colorado; Hartford, Connecticut; Fort Lauderdale, Miami, and Tampa, Florida; Indianapolis, Indiana; New Orleans, Louisiana; Kansas City, Missouri; Newark, New Jersey; Buffalo, New York; Cincinnati, Cleveland and Columbus, Ohio; Portland, Oregon; San Antonio, Texas; Seattle, Washington; and Milwaukee, Wisconsin. Although slightly outside the population parameters for this selection, Louisville, Kentucky and Atlanta, Georgia were also included.

[2] Regional designations used were those employed by the U.S. Bureau of the Census for the 1980 Census. The data were processed and crosstabulations performed using the Statistical Package for the Social Sciences.

20% NATIONAL SURVEY RESULTS

Survey respondents overwhelmingly (80%) felt that an adult bookstore located in the hypothetical neighborhood described would have a negative impact on residential property values of premises located within one block of the site. Of these, 21% felt that the property value would decrease in excess of 20%, while 59% foresaw a value decrease of from 1% to 20%. One-fifth of the respondents saw no resulting change in residential property values.

Seventy-two percent of the respondents also felt that there would be a detrimental effect on commercial property values at the same one block radius. Only 10% however, felt that the effect would exceed 20% of worth with the majority (62%) seeing a 1% to 20% decrease in value. 28% of the survey predicted that there would be no negative effect.

While the great majority of appraisers felt that the effect of an adult bookstore on property within one block of the site would decrease property values, they felt that this impact fell off sharply as the distance from the site increased.

At a distance of three blocks, only 36% of the respondents felt that there would be a negative impact on residential properties, whereas 64% felt that there would be no impact at all. Better than three-fourths (77%) of the survey saw no impact on commercial property at this distance.

In summary:

- The great majority of appraisers who responded to this survey felt that there is a negative impact on residential and commercial property values within one block of an adult bookstore.

- This negative impact dissipates markedly as the distance from the site increases, so that at three blocks the estimate of negative impact decreases by more than one half judged by the number of respondents indicating negative impact at three blocks.

- The majority of respondents felt that the negative impact of an adult bookstore is slightly greater for residential properties than for commercial properties and decreases less dramatically with distance for residences.

NATIONAL SURVEY OF APPRAISERS

Impact of Adult Bookstores On Property Values

RESIDENTIAL PROPERTY AT ONE BLOCK[3]

[GRAPH AND TABLE OMITTED]

COMMERCIAL PROPERTY AT ONE BLOCK

[TABLE AND GRAPH OMITTED]

RESIDENTIAL PROPERTY AT THREE BLOCKS

[GRAPH AND TABLE OMITTED]

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[3] The discrepancy between the number of survey responses and the number of responses to the question in this and subsequent tables is the result of some respondents having omitted answers to questions 6 and 7 of the survey.

COMMERCIAL PROPERTY AT THREE BLOCKS

[TABLE AND GRAPH OMITTED]

Respondents were also asked to evaluate the impact on residential property within one block of a number of alternate uses for the hypothetical site described in the survey.

Of the alternate uses proposed, a clear majority felt that a medical office or a branch library would increase the value of surrounding residential property. A store-front church, welfare office, tavern, record store, ice cream parlor or video-game parlor were generally felt to neither improve nor decrease residential property values significantly. On the other hand, a substantial majority felt that a pool hall, drug rehabilitation center or a disco would decrease property values – although not as overwhelmingly as an adult bookstore.

NATIONAL SURVEY OF APPRAISERS
Impact on Residential Properties

Land Use	Value				
	Higher			Lower	
	Much	Some	Same	Some	Much
Store-front church	5%	20%	58%	16%	1%
Pool hall	1%	8%	45%	38%	8%
Welfare office	-	12%	46%	33%	8%
Neighborhood tavern	2%	18%	45%	32%	4%
Record store	8%	27%	61%	5%	-
Medical office	24%	38%	35%	2%	-
Drug rehab Center	-	7%	35%	42%	17%
Ice cream parlor	15%	30%	53%	3%	-

NATIONAL SURVEY OF APPRAISERS (cont'd)
Impact on Residential Properties

Land Use	Value				
	Higher			Lower	
	Much	Some	Same	Some	Much
Video-game parlor	1%	18%	50%	27%	5%
Disco	-	11%	42%	35%	12%
Branch library	24%	34%	38%	4%	-

The survey also asked the degree to which adult bookstores affect property values generally and the basis for this opinion.

Twenty-nine percent of those expressing an opinion saw little or no effect as the result of adult bookstores on surrounding property values. They based this opinion on their own professional experiences (13%), the observation that this use usually occurs in an already-deteriorated neighborhood (24%) and the feeling that only one such adult entertainment use would be inconsequential.

A substantial-to-moderate negative impact was projected by 50% of the respondents. Twenty-nine percent felt that this was because it attracted "undesirables" to the neighborhoods in which they were located, while 14% felt that it creates a bad image of the area and 15% felt that the use offended pervailing community attitudes so that home buyers/customers would be discouraged. 13% based their opinion on professional experience.

A number of survey respondents (20%) saw the potential impact on a neighborhood as being contingent on certain variables. 28% of these felt that it would depend on the existing property values in the area as well as the subjective values of its residents. 23% felt that development standards such as facade and signage would determine impact and 11% saw the nature of the existing commercial area and its buffering capacity as being most important.

IMPACT ON VALUES

[GRAPH AND TABLE OMITTED]

NATIONAL SURVEY OF APPRAISERS

Impact of Adult Bookstores on Property Values

[TABLES OMITTED]

100% MSA SURVEY RESULTS

The 100% survey of Metropolitan Statistical Areas similar in size to Indianapolis produced results that were consistent in virtually all respects with the results of the 20% national survey.

As in the nationwide survey, respondents overwhelmingly (78%) indicated that an adult bookstore would have a negative effect on residential property values in the neighborhood described if they were within one block of the premises. 19% felt that this depreciation would be in excess of 20%, whereas 59% foresaw a decrease in value of from 1% to 20%.

Sixty-nine percent saw a similar decrease in commercial property values within one block of the adult bookstore. As in the national survey, far fewer (only 10%) felt that a devaluation of over 20% would occur. The majority (59%) saw the depreciation as being in the 1% to 20% range.

Once again, the negative impact observed within a one block radius of the adult bookstore fell off sharply when the distance was increased to three blocks - although, judged on the number of those indicating no impact, there would appear to be more of a residual effect on residential properties than on commercial properties.

39% of the appraisers felt that a negative impact on residential properties would still obtain at three blocks from the site.

Only three percent felt that this impact would be in excess of twenty percent. The remaining 36% felt that depreciation would be somewhere in the one to twenty percent range. 61% saw no appreciable effect at all at three blocks.

Commercial property was judged to be negatively impacted at three blocks by 23% of the survey. 76% saw no change in value as a result of the bookstore.

In summary:

- Appraisers assigned a negative value to an adult bookstore located within one block of residential and commercial properties at an approximate three-to-one ration.

- At a three block distance, this ratio tended to be reversed.

- The number of those indicating a decrease in value at three blocks decreased at only one half the rate for residential property as for commercial property.

MSA SURVEY OF APPRAISERS

IMPACT OF ADULT BOOKSTORES ON RESIDENTIAL PROPERTY AT ONE BLOCK

[GRAPH AND TABLE OMITTED]

IMPACT OF ADULT BOOKSTORES ON COMMERCIAL PROPERTIES AT ONE BLOCK

[GRAPH AND TABLE OMITTED]

IMPACT OF ADULT BOOKSTORES ON RESIDENTIAL PROPERTY AT THREE BLOCKS

[GRAPH AND TABLE OMITTED]

IMPACT OF ADULT BOOKSTORES ON COMMERCIAL PROPERTY AT THREE BLOCKS

[GRAPH AND TABLE OMITTED]

In response to a question asking appraisers to rate the impact of a number of different commercial uses at the same location on residential properties within one block, the majority felt that a medical office or a branch library would have a favorable impact while a welfare office or a drug rehabilitation center would have an undesireable impact. The majority felt that a store-front church, pool hall, neighborhood tavern, record store, ice cream parlor or a video-game parlor would not have much of an impact and were about equally split as to whether the effect of a disco would be neutral or negative.

MSA SURVEY OF APPRAISERS

Impact On Residential Properties

Land Use	Value				
	Higher			Lower	
	Much	Some	Same	Some	Much
Store-front church	4%	24%	52%	20%	1%
Pool hall	1%	12%	48%	33%	6%
Welfare office	1%	13%	41%	37%	7%
Neighborhood tavern	—	17%	52%	25%	6%
Record store	6%	29%	54%	10%	—

MSA SURVEY OF APPRAISERS (cont'd)

Impact Cn Residential Properties

Land Use	Value				
	Higher			Lower	
	Much	Some	Same	Some	Much
Medical office	20%	37%	39%	4%	—
Drug rehab center	—	6%	39%	40%	15%
Ice cream parlor	14%	29%	52%	5%	—
Video-game parlor	1%	17%	51%	28%	3%
Disco	—	13%	44%	33%	10%
Branch Library	24%	37%	34%	5%	1%

In response to the question about their evaluation of the impact of adult bookstores generally on surrounding property values, 21% of those expressing an opinion felt that there would be little or no impact with such a use. They principally based this opinion on their experience as appraisers (20%) and the observation that such uses usually located in areas that had already deteriorated (26%).

47% of the survey felt that there is a substantial-to moderate impact. Their opinions were based on professional appraisal experience (18%), and the observations that: given current mores, an adult bookstore would discourage home buyers and customers (14%); the use precipitated decline and discouraged improvement (11%); and, it would attract "undesirables" to the neighborhood (29%).

The nature of this impact on property was contingent on a number of factors in the minds of 32% of the respondents. 13% felt that it depended on local attitudes and the adequacy of legal controls on their operation. Exterior factors such as signage and building facade quality were seen by 16% as the determinant. 30% felt the impact would be directly related to the values (both monitary and human) prevalent in the neighborhood. And 20% felt that the answer depended on whether or not the business was likely to attract other such businesses.

EFFECT OF ADULT BOOKSTORES
ON PROPERTY VALUE
MSA SURVEY OF APPRAISERS

LITTLE OR NO EFFECT

[TABLE OMITTED]

SUBSTANTIAL OR MODERATE EFFECT

[TABLE OMITTED]

CONTINGENT EFFECT

[TABLE OMITTED]

SUMMARY OF FINDINGS

The great majority of appraisers (75%) who responded to the national survey of certified real estate appraisers felt that an adult bookstore located within one block would have a negative effect on value of both residential (80%) and commercial (72%) properties. 50% of these respondents foresaw an immediate depreciation in excess of 10%.

At a distance of three blocks, the great majority of respondents (71%) felt that the impact was negligible on both residential (64%) and commercial (77%) properties. Even so, it would appear that this residual effect of such a use was greater for residential than for commercial premises.

In answer to a survey question regarding the impact of an adult bookstore on property values generally, 50% felt that there would be a substantial-to-moderate negative impact, 30% saw little of no impact, and 20% saw the effect as being dependent on factors such as the predominant values (property and social) existing in the neighborhood, the development standards imposed on the use, and the ability of an existing commercial node to buffer the impact from other uses.

The results of the 20% national sample and the 100% survey of Metropolitan Statistical Areas were virtually identical. The

one significant variation that did occur was in the response to the question asked as to the effect of adult bookstores on property values generally. Respondents in the MSA survey placed more emphasis (32% versus 20%) on conditional factors at the site.

APPENDIX I AREA MAPS

ADULT ENTERTAINMENT BUSINESS STUDY

Study Area Land Use Maps I-II to I-IX

[MAPS OMITTED]

I-II 5429-31 East 38th St.
I-III 2101 West Washington St.
I-IV 3535 West 16th St.
I-V 6226-6122 East Washington St.
I-VI 4441-4475 North Keystone Ave.
I-VII 2500 East 10th St.
I-VIII 2300 West 10th St.
I-IX 5420 East Washington St.

APPENDIX II

Appraiser Survey

City of Indianapolis
William H. Hudnut, III
Mayor

Department of Metropolitan Development
David E. Carley, Director

January 20, 1984

Dear MAI Member:

The City of Indianapolis, Indiana is currently is the process of preparing a new local ordinance that will regulate the location of adult entertainment businesses in relation to residential neighborhoods in our community.

In an effort to provide a basis for the proposed legislation that is equitable and legally defensible, I would like to ask your help in establishing a "best professional opinion" on the matter. As a real estate professional, the opinions you share with us on the enclosed survey forms would be very valuable to us in the development of a positive legislative approach to this difficult local issue.

Thank you very much for your assistance.

Sincerely,
/s/
David E. Carley

cc. L. Carroll

INDIANA UNIVERSITY
School of Business
Bloomington/Indianapolis
10th and Fee Lane
Bloomington, Indiana 47405
(812) 337-5507

Division of Research

TO: Professional Real Estate Appraisers
FROM: Indiana University, School of Business, Division of Research

Please help us in this brief national survey. The information provided will help clarify an important question. Read the following information about a hypothetical neighborhood and respond to a few questions in terms of your professional experience and judgment.

A middle income residential neighborhood borders a main street that contains various commercial activities serving the neighborhood. There is a building that was recently vacated by a hardware store and will open shortly as an adult bookstore. There are no other adult bookstores or similar activities in the area. There is no other vacant commercial space presently available in the neighborhood.

Please indicate your answers to questions 1 through 4 in the blanks provided, using the scale A through G.

SCALE:
A Decrease 20% of more
B Decrease more than 10% but less than 20%
C Decrease from 0 to 10%
D No change in value
E Increase from 0 to 10%

F Increase more than 10% but less than 20%
G Increase 20% or more

1) How would you expect the average values of the RESIDENTIAL property within <u>one</u> block of the bookstore to be affected? _____

2) How would you expect the average values of the COMMERCIAL property within <u>one</u> block of the adult bookstore to be affected? _____

3) How would you expect the average values of RESIDENTIAL property located <u>three</u> blocks from the bookstore to be affected? _____

4) How would you expect the average values of the COMMERCIAL property <u>three</u> blocks from the adult bookstore to be affected? _____

5) Suppose the available commercial building is used for something other than an adult bookstore. For each of the following potential uses, would the average value of residential property within <u>one</u> block of the new businesses be...

A much higher
B somewhat higher — than if an
C about the same — adult bookstore
D somewhat lower — occupied the site.
E much lower

In the space provided, write the appropriate letter for each potential use.

Store-front church _____

Pool hall _____

Welfare office _____

Neighborhood tavern _____

Record store _____

Medical office _____

Drug rehabilitation center _____

Ice cream parlor _____

Video-game parlor _____

Disco _____

Branch library _____

6) In general, to what degree do you feel adult bookstores affect property values? _____

7) Why do you feel this way? _____

8) Where do you practice? _____

City _____ State _____

Your name _____

(If you prefer not to give your name, please check here ____)

Thank you for your cooperation. Please return this questionnaire in the postage paid envelope provided for your convenience.

APPENDIX III

LAND USE CONTROL OF ADULT ENTERTAINMENT

LEGAL BASIS

Zoning has traditionally been defined as a process by which a municipality legally controls the use which may be made of property and the physical configuration of development upon tracts of land within its jurisdiction. This is accomplished by means of zoning ordinances which are locally adopted to divide the land into different districts permitting only certain uses within each district for the protection of public safety, welfare, health and morality.[1]

Zoning regulations not only regulate the use to which buildings or property may be put within designated districts, but also the purpose or object of the use beyond the mere conditions or circumstances of the use.[2]

In a 1920 landmark decision, the New York Court of Appeals upheld New York City's comprehensive zoning legislation,[3] and reaffirmed this legislation as a proper exercise of the city's police powers.

In 1926, the practice of comprehensive zoning received substantial support when the United States Department of Commerce promulgated the *Standard State Zoning Enabling Act*. This act became the model for most of the early zoning enabling legislation in the country.

While the courts have reaffirmed that municipalities are properly exercising their police powers through zoning regulation, it is generally held that they have no inherent power to zone except (as is the case with the police power itself) as such power is delegated to them by the state legislature through statutory enactment. The right of state legislatures to delegate comprehensive zoning power to municipalities, on the other hand, is uniformly recognized by the courts.[4]

Because municipalities in the state had to be enabled to exercise zoning powers within their jurisdictions, the Indiana State Legislature, by means of enabling legislation, delegated this power to local units of government.[5]

Control of the use of private land inevitably raised a number of constitutional questions. In the landmark 1926 case of *Euclid v. Ambler Realty Co.*,[6] the United States Supreme Court upheld the city of Euclid, Ohio's municipal zoning ordinance which had been claimed to involve an unconstitutional deprivation of property by deciding that comprehensive zoning ordinances are a proper exercise of the police power and do not constitute an unconstitutional deprivation of property. This position was reaffirmed by the Supreme Court of the United States in 1927.[7]

Thus, the general legality of zoning is established beyond doubt. Subsequent decisions by this court[8] established that such ordinances, however, could be constitutional when applied to a particular property. This established the basis for the system under which the City of Indianapolis currently operates where each variance or rezoning request is decided on its own merits.

THE PUBLIC WELFARE

The police power authorizes a government to adopt and enforce all laws necessary to protect and further the public health, safety, morals and general welfare of its citizens.[9]

Limitations on the exercise of zoning power are essentially the same as those restricting the police power under the U.S. Constitution, i.e., they must be reasonable and guarantee due process and equal protection. It may not be exercised in an unreasonable, oppressive, arbitrary or discriminatory way. Zoning laws, then, must have a real, substantive relation to the legitimate governmental objective of the protection and furtherance of the public health, safety, morals and general welfare of citizens.

The public welfare, in these contexts, means the stabilization of property values, promotion of desirable home surroundings, and happiness,[10] and embraces the orderliness of community growth, land value and aesthetic objectives[11] and is reasonably designed to further the advancement of a community as a social, economic and political unity.[12]

CONTROL OF ADULT ENTERTAINMENT[13]

Reacting to the increased availability of pornography in the United States and attendant pressures at the community level for its control, a number of municipal governments have addressed the proliferation of adult entertainment businesses through, among various methods, land use controls. The validity of such an approach was upheld in 1976 in the landmark decision *Young v. American Mini Theatres, Inc.*[14] in which the Court upheld a Detroit zoning ordinance which prohibited more than two adult movie theaters or other sexually-oriented enterprises from locating within 1000 feet of

one another or certain other designated businesses. Against attacks grounded in the First and Fourteenth Amendments to the Constitution of the United States, the Court sustained the ordinance on the dual bases that:

1. The ordinance was a reasonable response to demonstrated adverse land-use and property value effects associated with sexually-oriented enterprises; and

2. The ordinance silenced no message or expression but merely placed geographic restrictions upon where such expression could occur.

While an exhaustive analysis of the *Young* decision is beyond the scope of this discussion, the following generalized principles may be gleaned from the plurality, concurring and dissenting opinions of the Justices. First, hostility to constitutionally protected speech is an impermissible motive. The more apparent and rational the relationship of the adult use restrictions to recognized zoning objectives, such as the preservation of neighborhoods and the grouping of compatible uses, the greater the likelihood that the restrictions will be upheld.

Second, even a properly motivated ordinance will be invalidated if it unduly burdens first amendment rights. For example, an ordinance imposing locational restrictions that are so severe as to result in an inability to accommodate the present or anticipated number of adult businesses in a municipality will certainly be struck down. The *Young* court repeatedly moored its decision upholding the Detroit ordinance upon the finding that numerous sites complying with the zoning requirements were available to adult

businesses and that the market for sexually explicit fare, viewed as an entity, was therefore "essentially unrestrained".

Third, ordinances which are so vague in wording and definitions that a non-pornographic entrepreneur is unclear whether he falls within its proscriptions may be violative of due process. A vague ordinance may operate to hinder free speech through use of language so uncertain or generalized as to allow the inclusion of protected speech within its prohibitions or leave an individual or law enforcement officers with no specific guidance as to the nature of the acts subject to punishment.

Finally, an ordinance which authorizes the exercise of broad discretionary power by administrative officials to determine which adult business will be allowed to operate, especially if the exercise of such discretion is not grounded on objective, ascertainable criteria, will probably be disapproved as contrary to the precept that, in the First Amendment area, "government may regulate only with narrow specificity".

Control Area Land Use Map I-X
2600 West Washington St.

[MAP OMITTED]

Any community, then, which would employ its zoning power to regulate adult uses within its jurisdiction must be particularly concerned that the adoptive ordinance be demonstrably motivated by and founded on sound land use principles, allow reasonable accommodation for such uses within its jurisdiction, and that it clearly define both the nature and regulations of the use in order to avoid, to the extent possible, the need for subjective interpretation of each proposed use.

The *Young* decision has encouraged a great amount of experimentation on the part of municipalities in an effort to prevent deterioration of their commercial districts and adverse impact upon adjacent areas. The effectiveness of these innovations will be determined by time and the legal tests to which they will be subject as this business segment establishes itself.

For the time being, however, this decision encourages an approach in which localities have tended to control the siting of an adult entertainment businesses on the basis of land use.

Control Area Land Use Map I-XI
750 North Shadeland Ave.

[MAP OMITTED]

Appendix C

City of Oklahoma City
COMMUNITY DEVELOPMENT DEPARTMENT
Planning Division

The City of Oklahoma City
Community Development
200 N. Wolkes
Oklahoma City, Okla. 73102

ADULT ENTERTAINMENT BUSINESSES IN
Oklahoma City

A SURVEY OF REAL ESTATE APPRAISERS

March 3, 1986

Dear Oklahoma City Appraiser,

The City of Oklahoma has recently adopted a new ordinance that will regulate the location of adult entertainment businesses.

Adult entertainment businesses are defined in our ordinance as those which emphasize acts or materials depicting or portraying sexual conduct. These businesses include "Adult Bookstores," *clubs* with *nude dancers, theatres* which show sexually explicit *movies. etc.*

In an effort *to* more completely analyze the impact of adult businesses on surrounding properties, Planning Division asks for your help in establishing a "best professional opinion' on the matter. As a real estate professional, the opinions you share with us on the enclosed survey forms would be very

valuable to us in the development of a local data base for this sensitive land use issue.

Thank you very much for your assistance. Sincerely,

Community DEVELOPMENT DEPARTMENT
Planning Division
CITY OF OKLAHOMA CITY

TO: professional Real Estate Appraisers

Please help us in this brief Oklahoma City survey. The information provided will help us establish an important data base regarding adult entertainment businesses.

The first four questions relate to the hypothetical situation presented below. The last three questions refer to actual situations in Oklahoma City that you might be aware of.

> A middle income residential neighborhood borders an arterial street that contains various commercial activities serving the neighborhood. There is a building that was vacated by a hardware store and will open shortly as an adult bookstore. There are no other adult bookstores or similar activities in the area. There is no other vacant commercial space presently available in the neighborhood.

Please indicate your answers to questions 1 through 4 in the blanks provided, using the scale A through C.

> SCALE: A Decrease 20% or more
> B Decrease more than 10% but less than 20%
> C Decrease from 0 to 10%

D No change in value
S Increase from 0 to 10%
F Increase more than 10% but less than 20%
G Increase 20% or more

1) How would you expect the average values of the RESIDENTIAL property within ONE block of the bookstore to be affected?

2) How would you expect the average values of the COMMERCIAL property within ONE block of the bookstore to be affected?

3) How would you expect the average values of RESIDENTIAL property located THREE blocks from the bookstore to be affected?

4) How would you expect the average values of COMMERCIAL property located THREE blocks from the bookstore to be affected?

5) Are you aware of the existence of adult entertainment businesses in Oklahoma City?

6) What is your opinion as to the effect of these businesses on surrounding properties?

7) Specifically, how do you think these businesses affect the surrounding property?

Are you a member of:

MAI

ASA

SREA

other

Your name or agency

(If you prefer not to give your name, please check here)

Thank you for your cooperation. Please return this questionnaire in the postage paid envelope provided for your convenience.

METHODOLOGY

On February 7, 1986, 100 questionnaires were mailed. All real estate appraisers in Oklahoma City listed in the Yellow Pages were included in the survey. As of March 1, 1986, 34 (34%) of the questionnaires had been completed and returned. Real estate appraisers do not receive certification from the State of Oklahoma; however, 26 of the respondents (76%) belonged to a professional organization. The table below summarizes the objective part of the questionnaire. Subjective comments are discussed in a separate section of this report.

SCALE OUESTIONS

1 2 3 4

A 11 (32%) 7 (21%) 4 (12%) 4 (12%)

Decrease

20% or more

B 8 (24%) 9 (26%) 3 (9%) 3 (9%)

Decrease

10% - 20%

C 6 (18%) 10 (29%) 10 (29%) 7 (21%)

Decrease

0 - 10%

D 9 (26%) 8 (24%) 17 (50%) 20 (59%)

No change

in value

E,F, and G were positive values--not checked by anyone

OKLAHOMA CITY REAL ESTATE APPRAISER SURVEY RESULTS

> The 100% survey of real estate appraisers in Oklahoma City produced results that were consistent in virtually all respects with the result of the national survey of appraisers carried out by the city of Indianapolis.

Respondents overwhelmingly (74%) indicated that an adult bookstore would have a negative effect on residential property values in the hypothetical neighborhood described if they were within one block of the premises. 32%' felt that this depreciation would be in excess of 20%, wheras 42% foresaw

a decrease in value of from 1% to 20%. (Comparative national figures are [78]k, 19%' and 59% respectively.)

Seventy-six percent saw a similar decrease in commercial property values within one block of the adult bookstore. As in the national survey, fewer (21%) felt that a devaluation of over 20% would occur. The majority, (55%) saw the depreciation as being in the 1% to 20% range. (Comparative national figures are 69%, 10% and 59% respectively.)

The negative impact fell off sharply when the distance was increased to three blocks. As in the national survey, there appears to be more of a residual effect on residential properties than on commercial properties.

50% of the appraisers felt that a negative impact on residential properties would still obtain at three blocks from the site. Only 12% felt that this impact would be in excess of 20%. The remaining 38% felt that depreciation would be somewhere in the 1% to 20% range. 50% saw no applicable effect at all at three blocks. (Comparative national figures are 39%, 3% and 61%.)

Commercial property was judged to be negatively impacted at three blocks by 41% of the survey. 59% saw no change in value as a result of the bookstore. (Comparative national figures are 23% and 76% respectively.)

In summary:

- The great majority of appraisers (about 75%) who responded to this survey felt that there is a negative impact on residential and commercial property values within one block of an adult bookstore.

- This negative impact dissipates as the distance from the site increases, so that at three blocks, ~ half of the appraisers felt that there is a negative impact on residential property and less than half felt that there is a negative impact on commercial property.

RESULTS FROM SUBJECTIVE QUESTIONS

Oklahoma City real estate appraisers were also asked for their opinions as to the effect of adult entertainment businesses on surrounding properties. Most of the respondents discussed a variety of negative effects. Only five *respondents (14%)* said that adult entertainment business had very little effect on surrounding properties. Of these, three appraisers felt that these types of businesses located in commercial areas that were already blighted. All respondents indicated their awareness of the existence of adult entertainment businesses in Oklahoma City; many referred to the 10th and MacArthur location as a prime example of an undesirable cluster situation.

Opinions are summarized below:

Not good. Attracts undesirables, threat to residents feeling of safety & security.

- acts as a deterrent to home sales

Would you wart your home or business next door?

-Forces good businesses out

-Tends to have a snowball effect

-*An* immediate *transition* begins, with the better *quality businesses* moving out and a lower class business moving in (pawnshops, bingo parlors)

-Embarrassment to other businesses and clientele - late hours, parking-trash and debris - vandalism

-Children in the area in danger of adverse influence or by actual molestation by perverted people drawn to such establishments

Typical shoppers and residents go elsewhere to shop, and, if ~ able to live.

If there is a large concentration of this type of business, there can be a very large loss in property value.

-Tends to prevent economic improvement in the area, effects the community as to attracting other businesses

-Detrimental impact on rental rates

(2)

No. 06-1702

FILED
JUL 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

RELIABLE CONSULTANTS, INC. d/b/a DREAMERS,

Petitioner,

v.

CITY OF KENNEDALE, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's opinion reversing the district court does not implicate an important federal question that has not been settled by this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's opinion reversing the district court does not conflict with a decision of this Court or a Court of Appeals.

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STATEMENT OF THE CASE

This case was brought by Reliable Consultants, Inc. d/b/a Dreamer's ("Petitioner"), a sexually oriented business, against the City of Kennedale, Texas ("Kennedale"). Petitioner is a business that sells and rents sexually explicit materials including videos, DVDs, magazines, and other merchandise. (Petitioner's Apdx. 4a-5a). Petitioner does not provide entertainment designed to be consumed by customers on Petitioner's property. *Id.* Petitioner's suit alleges, among other things, that Kennedale's zoning and licensing regulations of sexually oriented businesses violate the First Amendment as applied to retail-only, off-site businesses.

Petitioner and Kennedale both filed motions for summary judgment. To support the challenged regulations, Kennedale offered evidence in the form of studies performed by other cities, results and comments from Kennedale's own survey of local real estate appraisers, public comments by citizens, and relevant case law in determining that sexually oriented businesses, including off-site businesses, can generate harmful secondary effects that the regulations were designed to prevent.[1] *Id.*

---

1. By commissioning a survey to obtain opinions from local real estate appraisers, Kennedale went above and beyond what it was legally required to do. Kennedale's actions do not support the incorrect statement made by Petitioner that Kennedale commissioned its own study due to a belief that "the Indianapolis and Oklahoma City studies were deficient . . ." (Petition for Writ 6).

The district court granted summary judgment to Kennedale as to most of the claims raised, but granted summary judgment to Petitioner on the issue of whether Kennedale's regulations were narrowly tailored to advance a substantial governmental interest. The district court concluded that Kennedale failed to present sufficient evidence of the harmful secondary effects caused by off-site sexually oriented businesses like Petitioner's, and enjoined Kennedale from enforcing its regulations against Petitioner. (Petitioner's Apdx. 66a-67a).

The appeal to the Fifth Circuit presented a single question: Whether the evidence offered by the City of Kennedale sufficiently supports its ordinance regulating sexually oriented businesses, including off-site businesses? (Petitioner's Apdx. 4a).

The Fifth Circuit properly analyzed Kennedale's evidence under the framework established by this Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), reversing the district court and holding that Kennedale "produced evidence that it could have reasonably believed was relevant, and thus could have properly relied upon," concluding that Kennedale's "ordinances are narrowly tailored to advance a substantial governmental interest."

REASONS FOR DENYING THE PETITION

I. THE CRITERIA FOR REVIEW HAVE NOT BEEN MET BECAUSE THE COURT OF APPEALS APPLIED WELL-SETTLED PRINCIPLES OF LAW AS SET FORTH BY THIS COURT IN *RENTON* AND *ALAMEDA BOOKS.*

The only Supreme Court jurisdictional rule applicable to this Petition is Rule 10(a). In its first point of contention, Petitioner argues that the Fifth Circuit departed from the accepted and usual course of judicial proceedings by employing the wrong standard of review to reverse the district court's grant of summary judgment to Petitioner. However, the Fifth Circuit's review of Kennedale's sexually oriented business ordinances did not depart from the clearly accepted standard of review employed by circuit courts and this Court. The Court of Appeals correctly applied established law to the particular facts of this case.

Petitioner focuses its argument on the interpretation of a definition of "adult bookstore" contained in the evidence offered by Kennedale, asserting that the district court made a factual finding as to the definition, and faulting the Fifth Circuit for disturbing that finding on appeal. Petitioner opines that the Fifth Circuit's review was contrary to Rule 52(a) of the Federal Rules of Civil Procedure. However, Rule 52(a) is inapplicable on summary judgment where questions of fact can only be resolved in favor of a non-moving party and there are no witness credibility issues. By its express language, Rule 52(a) applies only where an action has been "tried upon the facts without a jury or with an advisory jury." Here, there was no trial because the matter at hand was disposed of on summary judgment.

The task of the appellate court when reviewing a grant of summary judgment is quite different from the review of a judgment entered after a full trial. "When reviewing a case disposed of under Fed.R.Civ. P. 56, an appellate court must apply the same general standard as that initially employed by the trial court-whether there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Bank of Commerce of Laredo v. City Nat. Bank of Laredo*, 484 F.2d 284, 289 (5th Cir. 1973) (citing 10 C. Wright & A. Miller, Federal Practice and Procedure § 2716, at 430 (1973)), *cert. denied*, 416 U.S. 905 (1974). Therefore, on summary judgment the appellate court undertakes an independent review of the entire record. *Stine v. Marathon Oil Co.*, 976 F.2d 254, 265 (5th Cir. 1992); Fed.R.Civ.P. 56. This review must be conducted without deference to the trial court's view of the case, viewing the record in the light most favorable to the party opposing the motion and indulging all reasonable inferences in that party's favor. Fed.R.Civ.P. 56. Like the trial court, the appellate court is not called upon to decide factual issues on summary judgment, but only to determine whether there may be factual issues to be tried. *McPhee v. Oliver Tyrone Corp.*, 489 F.2d 718, 720 (5th Cir. 1974).

Contrary to the position taken by Petitioner, since a summary judgment may not be entered where there is a genuine issue as to any material fact, there is no fact-finding function in connection with the entry of such a judgment. *Dredge Corp. v. Penny*, 338 F.2d 456, 463 (9th Cir. 1964). As this Court has previously noted, "Rule 52(a) applies to findings of fact, but does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 486 (1984).

As has long been recognized, "Whether . . . free speech rights have been infringed is a mixed question of law and fact." *Int'l Soc'y for Krishna Consciousness of New Orleans, Inc. v. Baton Rouge*, 876 F.2d 494, 496 (5th Cir. 1989) (citing *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n. 8 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)). Accordingly, the appellate court's review is de novo. *Id.* (quoting *Dunagin*, 718 F.2d at 748 n. 8).

Petitioner stated, incorrectly, that Kennedale argued that because two of the studies relied upon contained the generic term "adult bookstore," they inherently must have referred to those stores that do not offer on-site entertainment. (Petition for Writ 7). Kennedale actually asserted that because the studies used the term "adult bookstore," it was ***reasonable*** for the city council to believe that the studies were applicable to stores that do not offer on-site entertainment. Contrary to Petitioner's argument, the Fifth Circuit did not make a factual determination regarding the definition of "adult bookstore;" instead the court made a legal finding, consistent with *Alameda Books*, that the city council was reasonable in its reliance on the studies. (Petitioner's Apdx. 9a). The Court of Appeals unequivocally indicated that it applied the constitutional framework in *Renton* and *Alameda Books* to its examination of Kennedale's ordinance. (Petitioner's Apdx. 6a). The Fifth Circuit did not define "bookstore," but merely overturned the district court's finding that Kennedale acted unreasonably in interpreting the studies as applying to stores that do not offer on-site entertainment. (Petitioner's Apdx. 64a-65a). The district court and the Fifth Circuit both made a finding of law as to whether Kennedale employed shoddy reasoning. The Fifth Circuit correctly identified that finding to be a legal determination, subject to *de novo* review. (Petitioner's Apdx. 5a).

As the Fifth Circuit correctly stated, the **existence** of evidence is a question of fact; while the determination regarding whether Kennedale reasonably relied upon the evidence is a question of law, reviewed *de novo*. (Petitioner's Apdx. 5a). Whether the evidence (the Oklahoma survey and the Indianapolis survey) exists is not in dispute. The parties merely disagreed upon whether Kennedale employed shoddy reasoning in relying upon the evidence to regulate a business such as Dreamer's. Petitioner attempts to argue that "the Fifth Circuit's decision here, if allowed to stand, will remove the key fact-finding role from the district court and place it in the hands of the appellate courts, which have no contact with witnesses or evidence other than through the lens of a district court." (Petition for Writ 10). Petitioner conveniently ignores that the decision under review is a summary judgment ruling, and the appellate court is privy to the exact same evidence that was before the district court. It is well-settled that the question of whether a movant is entitled to summary judgment is one of law, subject to *de novo* review. There was no departure from the clearly accepted standard of review; therefore, the criteria for review under Rule 10(a) have not been met and the writ should not be granted.

II. THE CRITERIA FOR REVIEW HAVE NOT BEEN MET BECAUSE A SPLIT IN THE CIRCUIT COURTS DOES NOT EXIST.

Petitioner contends that the Fifth Circuit Court of Appeals has rendered a decision in conflict with the Tenth Circuit Court of Appeals' *Heideman v. South Salt Lake City* unpublished decision. 2006 WL 245160 (10th Cir. 2006).[2]

2. This Court denied the Petition for writ of certiorari in *Heideman v. South Salt Lake City*. 127 S.Ct. 110 (2006).

Petitioner faults the Fifth Circuit for not expressly stating that its review was within the evidentiary burden-shifting framework set out by the Supreme Court in *Alameda Books*. A review of the Fifth Circuit's decision in the case at hand, however, shows that the appellate court did apply the burden-shifting analysis to Petitioner's appeal.

At the first step of the analysis, "the city certainly bears the burden of providing evidence that supports a link between" the regulation and the "asserted secondary effects." *Alameda Books*, 535 U.S. at 437. While the evidentiary burden is minimal at this first stage, the city cannot employ "shoddy data or reasoning." *Id.* at 437-38. However, "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52; *see also Alameda Books*, 535 U.S. at 451. The evidence must only be "reasonably believed to be relevant" in showing a connection between the source and the harm the city seeks to remedy. *Alameda Books*, 535 U.S. at 438.

In the case that is currently before this Court, Kennedale introduced nine studies from other cities that it relied upon regarding adverse secondary effects caused by sexually oriented businesses. (Petitioner's Apdx. 8a). Kennedale also introduced its own survey of opinions from local appraisers, as well as citizen commentary from public meetings, identifying adverse effects attributable to sexually oriented businesses within the local community. *Id.*

At step one of the evidentiary analysis, both the district court and the Fifth Circuit concluded that seven of the nine studies conducted by other cities failed to meet the heightened

evidentiary standard adopted by the Fifth Circuit in *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003). (Petitioner's Apdx. 8a; 64a). Since its *Encore Videos* decision, the Fifth Circuit has required that "a city that enforces an ordinance meant to prevent harmful secondary effects associated with the operation of an off-site business must rely on evidence showing that off-site businesses, rather than the broader category of sexually oriented businesses that include on-site businesses, cause harmful secondary effects." (Petitioner's Apdx. 7a, citing *Encore Videos*, 330 F.3d at 295). In the matter under review, the district court interpreted *Encore Videos* to require it to disregard the remaining two studies (the Indianapolis study and the Oklahoma City study). The Fifth Circuit determined that the remaining two studies relied upon by Kennedale both concluded that adult bookstores negatively impacted property values. The Court further determined that is was reasonable for Kennedale to believe that the term "adult bookstore" could refer to businesses offering no on-site entertainment, meeting the first step of the evidentiary analysis. (Petitioner's Apdx. 8a-9a).

At the second step of the analysis, the party challenging the regulations has the burden of offering "a competing theory" or "reason to question the city's theory." *Alameda Books*, 535 U.S. at 437. Faithful to the dictates of *Alameda Books*, the Fifth Circuit proceeded to step two of the burden-shifting analysis by considering Dreamer's challenge to the Indianapolis study and the Oklahoma City study, finding it without merit. (Petitioner's Apdx. 9a). The Fifth Circuit specifically addressed Petitioner's competing theories and found them insufficient to shift the burden back to Kennedale. *Id.* The Fifth Circuit employed the exact same analysis used by the Tenth Circuit in *Heideman*. 2006 WL 245160 at 3. Because Kennedale satisfied its burden and Dreamer's failed to present a competing theory or sufficient evidence to discredit Kennedale's evidence, the

Fifth Circuit concluded its analysis with a finding that Kennedale's ordinance is narrowly tailored to advance a substantial governmental interest. (Petitioner's Apdx. 11a).

While the Fifth Circuit may not have expressly stated that it was conducting a burden-shifting analysis, it is apparent in the body of its opinion that the appellate court applied the *Alameda Books* burden-shifting standard. Therefore, the Fifth Circuit's review of the present case was consistent with the Tenth Circuit's review of *Heideman v. South Salt Lake City*. 2006 WL 245160 (10th Cir. 2006). The Fifth Circuit's opinion in the present case is also consistent with the Second Circuit's opinion in *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163 (2nd Cir. 2007), and the Seventh Circuit's opinion in *Andy's Restaurant and Lounge, Inc. v. City of Gary*, 466 F.3d 550 (7th Cir. 2006). Based on Petitioner's criticism of the application of the *Alameda Books* burden shifting analysis by the circuit courts cited in its Petition, Petitioner is clearly under the mistaken belief that *Alameda Books* alters the standard of review found in Rule 56 of the Federal Rules of Civil Procedure. Taking Rule 56 into account, a split in the circuits does not exist. The criteria for review under Rule 10(a) have not been met, so the writ should not be granted.

CONCLUSION

Petitioner fails to advance any compelling reason for review. The Court of Appeals properly applied well settled principles of law. Review by the Supreme Court will not fulfill any of the requirements or goals of Rule 10. The petition for review should be denied.

This 26th day of July, 2007.

Respectfully submitted,

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